Supreme Court, U.S.
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95-658 OCT 16 1995

No. _____ OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ADIN FALKOFF -
PETITIONER

vs-

INTERNATIONAL BUSINESS MACHINES
CORPORATION -
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDICES A-G

Adin Falkoff, Pro se
163 Great Oak Lane
Pleasantville, NY 10570
(914)769-3652

October 16, 1995

QUESTIONS PRESENTED

1. Whether constitutional rights to a trial by jury and due process of law mandate that where it is at least equally reasonable under New York State law principles of "transactional analysis" and related case law to find that *res judicata* may not be warranted, preclusion on the basis of prior litigation be denied to the movant in a motion for dismissal by reason of *res judicata*?

2. Whether the constitutional right to equal protection of the laws is subverted by the short shrift given to *pro se* appellants, wherein oral argument before the Appeals Court is limited to but five minutes to deal with both *res judicata* and summary judgment issues with no questions from the Bench, wherein the ruling in favor of the represented appellee provides no rationale for the Court's affirmance of summary judgment, and wherein unregulated excessive printing costs gratuitously incurred by the appellee are assessed against the *pro se* appellants?

3. Whether the Court of Appeals sanctioned such a departure from the usual course of judicial proceedings — by affirming a District Court Order which, in deciding a motion for dismissal under Rule 56(b), consistently favors the movant in evaluating disputed questions of material fact and ultimately bases its decision on the very stereotyping that is eschewed by the Rehabilitation Act whose mandates it was called upon to enforce — as to call for an exercise of this Court's power of supervision in order to further the interest of justice.

PARTIES

The parties to this case are Linda D. Misek-Falkoff and Adin Falkoff, Plaintiffs; and International Business Machines Corporation, Defendant.

OPINIONS and ORDERS BELOW

The principal ruling of the Court of Appeals for the Second Circuit is an unpublished Summary Order, No. 94-7599 filed June 16, 1995, referenced as Misek-Falkoff v. IBM, 60 F.3rd 811 (Table). It appears in Appendix A to this Petition.

An Order of the Court of Appeals awarding costs to the appellee, dated July 27, 1995, a Notice Of Motion for reconsideration of the costs award, dated August 7, 1995, and the Order denying said motion, dated September 11, 1995, appear in Appendix B.

The Memorandum Order by the District Court for the Southern District of New York for the case-in-chief, USDC SDNY 89cv6269 (VLB), was published as Misek-Falkoff & Falkoff v. International Business Machines Corporation, 854 F.Supp. 215 (May 13, 1994), and is reproduced here as Appendix C.

A Memorandum Order by the District Court, ruling on attorney-client privilege and disclosure of medical information, was published as Misek-Falkoff & Falkoff v. International Business Machines Corporation, 144 F.R.D. 48 (Sept. 29 , 1992), and is reproduced here as Appendix D.

A Memorandum Order by the District Court holding that an attorney was not entitled to a charging lien or bond was published as Misek-Falkoff & Falkoff v. International Business Machines Corporation, 829 F.Supp. 660 (Aug. 25, 1993), and is reproduced here as Appendix E.

A decision by the NY Supreme Court, Appellate Division, First Department, in Misek-Falkoff & Falkoff v. International Business Machines & Weis, 162 A.D.2nd 211, 556 N.Y.S.2d 331 (June 14, 1990), the case used as the basis for granting dismissal on grounds of *res judicata*, is reproduced here as Appendix F.

JURISDICTION

The Court of Appeals Summary Order in this matter was filed on June 16, 1995. On September 11, 1995, Justice Ginsburg granted an extension of time to file a Petition for a Writ of Certiorari to and including October 16, 1995. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the US Constitution in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Amendment VII of the US Constitution in pertinent part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

Amendment XIV of the US Constitution in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; New York Executive Law 296(1)(a); New York Civil Rights Law 40-c; Judiciary and Judicial Procedure 28 USCS § 1654. Appendix G[1].

STATEMENT OF THE CASE

The USDC SDNY had jurisdiction based upon the provisions of 28 U.S.C. § 1331, because they arose under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794.

On September 22, 1989, a complaint was filed in the Southern District of New York on behalf of the plaintiffs herein seeking relief from violations of the Rehabilitation Act of 1973 and related civil rights State laws. The complaint alleged that an employer, International Business Machines Corporation, had subjected an employee, Linda Misek-Falkoff, Ph.D., to adverse discrimination because of her handicaps or perceived handicaps, had failed to offer reasonable accommodations, had failed to engage in dialogue for the purpose of determining reasonable accommodations, and had secretly

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[1] Petitioner apologizes for the missing Appendix G, which was planned to provide statutes for the convenience of the Court. Unfortunately, time has run out. If the Court deems this a deficiency, petitioner will provide it as may be required.

conspired to sever and did sever the employee from activities of the workplace in a prejudicial fashion, solely on account of her handicaps or perceived handicaps, although she was otherwise qualified to perform her job; all in violation of both Federal and State civil rights statutes.

Defendant IBM answered on December 21, 1989. There ensued extensive discovery over the course of three years, entailing travel to distant cities for depositions and eventually adding up to more than 20 depositions and the production of some 6000 pages of documents by the defendant. IBM ultimately moved for dismissal on grounds of res judicata and summary judgment (Rule 56(2)) on September 30, 1992. Plaintiffs answered on November 5, 1992. IBM delayed their reply until March 5, 1993, at which time they also filed a modified motion asking only for dismissal on grounds of res judicata. They then evinced dissatisfaction with that strategy and at a conference which they requested, on May 11, 1993, they asked for and received permission from Judge Broderick to again move for both res judicata and summary judgment. Their new motion was filed on June 16, 1993, and plaintiffs filed a sur-reply on November 19, 1993.

It is noteworthy that IBM's motion for res judicata did not rest on any facts or circumstances not known or extant before discovery started. Contrastingly, plaintiffs learned of evidence which would have supported that part of the pleadings in the antecedent Weis case which the Appellate Division, First Department did not reach (see Appendix F):

> Absent concrete factual allegations of a continuing conspiracy or concerted course of action against plaintiff, we need not reach the issue of whether, if properly pleaded, the acts more remote in time could be considered actionable as part of a "continuing" tort.

The "concerted course of action" — as came to light in the course of discovery proceedings — turned out to be a plan by IBM management to exploit Dr. Misek-Falkoff's neurological handicaps to sever her from the workplace under guise of "accommodation." Appendix E includes a ruling that the discovered text,

> "had no problems with case -- 'someone not unsat today -- can you force her out of business.' Yes -- MDIP,"

was not protected by attorney client privilege and could not be quashed. This text was a reported utterance at a meeting of a medical disability panel secretly considering the case of the plaintiff ("MDIP"

stands for Medical Disability Income Plan).[2] The stereotyping essential to carrying out the plan of exploitation, and the secrecy surrounding the consideration of the putative accommodation are violations of the Rehabilitation Act.

Thus, material matters at issue in the instant federal action were explicitly excluded from consideration by the Appellate Division in their ruling in Weis. Perforce, therefore, for that reason (among others) Weis should not have been given the absolute preclusive effect attributed to it, independent of other considerations such as the applicability of Rule 60(b) as a consequence of the deception perpetrated on the court[3] during the course of that litigation.

More detail on the nature of the case can be found in Appendix H, a reformatted version of the Appellant Brief to the Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

That federal courts must give full faith and credit to state court results is not in question. Case law is replete with judicial affirmation of this. But characteristically, although a leading case, Matter of Reilly v. Reid, 45 NY2d 24, 407 NYS2d 645, 648, 379 NE2d 172 (1978), leaves the way open with the permissive phrase, ". . . separately stated causes of action may . . . be grounded on the same gravamen . . ." the "may not" seems to be generally overlooked. This Court may wish to take action to foster a more equitable balance in such matters — especially as "transactional analysis" is spreading widely among the States.

The Second Circuit Appeals Court, in Teahan v. Metro-North 951 F.2d 511 (2nd Cir 1991) reversed and remanded a finding of summary judgment, in the course of which it cogently stated the aims of the Rehabilitation Act and the consequent obligations on the employer and the courts:

> For an employer to assume that simply because of a handicap an individual is unable to function in a given employment

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[2] Present at the panel meeting in Bethesda, Md., for the express purpose of influencing the decision about the Dr. Misek-Falkoff, were the Research Division Personnel Director and the IBM Regional Medical Director, both from the New York area and neither one normally attendant at such meetings.

[3] Through a sequence of sworn statements by IBM's attorneys it was falsely maintained to the court that Dr. Misek-Falkoff could return to active employment at some time, whereas discovery in the instant case made it clear that this was out of the question as far as IBM was concerned.

> context stereotypes that person, seeing him, as it were, through a glass, darkly. To view a handicapped person in such a simplistic way effects the discrimination forbidden by § 504.

Yet in the instant case this same Appeals Court has ratified a summary judgment decision by the lower court which is rife with stereotyping, notably in the speculation that a person with a neurological handicap would require "total insulation from supervisors or coworkers . . . " to forestall "chances of recurrent outbursts." This Court may deem it useful and necessary to resolve such a blatant contradiction and give direction as to the proper attitude for the courts to assume in such situations.

The costs of litigation tend to drive many people out of the market for judicial intervention, while others, feeling the weight of injustice, make a sincere effort to represent themselves. This High Court may deem it desirable to examine and influence how *pro se* litigants fare as a class, while reviewing the treatment accorded these plaintiffs.

CONCLUSION

If this Court elects not to address the issues presented in this petition at the present time, it is requested that the writ issue and that the matter be remanded to the Second Circuit Court of appeals for edetermination in the light of the facts above and further instances of differences in their own recent rulings; for example, on preclusion in LaTrieste Restaurant and Cabaret v. Village of Port Chester, 40 F3d 587 (1994), and on Rehabilitation Act issues in Borkowski v. Valley Central School District.

Dated, October 16, 1995

Respectfully submitted,

Adin Falkoff

Adin Falkoff, pro se petitioner

Misek-Falkoff & Falkoff

v.

IBM

NO. 94-7599

United States Court of Appeals,

Second Circuit.

June 16, 1995

Appeal From: S.D.N.Y., 89-cv-6269 854 F.Supp. 215

AFFIRMED.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Second Circuit provides by rule for disposition by summary order when a decision is unanimous and each judge believes that "no jurisprudential purpose would be served by a written opinion." Decisions without formal opinions "shall not be cited or otherwise used in unrelated cases." Second Circuit Rules, s 0.23, 28 U.S.C.A.)

END OF DOCUMENT

DC: SDNY
DC# 89cv6269
Jdg Broderick

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 16th day of June, one thousand nine hundred and ninety five.

Present:

Honorable James L. Oakes,
Honorable Ralph K. Winter,
Honorable J. Daniel Mahoney,
Circuit Judges

June 16 1955

LINDA D. MISEK-FALKOFF and ADIN FALKOFF,
Plaintiffs-Appellants,

v.

ORDER
94-7599

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Adin Falkoff, pro se, appeals from Judge Broderick's grant of International Business Machines Corporation's ("IBM's") motion for summary judgment dismissing the complaint he filed with Linda D. Misek-Falkoff. On appeal Falkoff contends that his -- and his spouse's -- claims are not precluded by a previous New York State judgment and that summary judgment should not have been granted because there are genuine issues of material fact. We disagree. The claims are precluded by a prior state court judgment.

A state court action filed by the Falkoffs in 1988 claimed that various conduct on IBM's part constituted intentional infliction of extreme emotional distress. The factual allegations related to an alleged campaign of harassment by IBM during the final years of Misek-Falkoff's employment. The same alleged campaign of harassment forms the factual foundation for the claims asserted in the instant case.

Federal courts give state court judgments the preclusive effect they would have under the law of the state where judgment was rendered. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 80-81 (1984). New York has adopted a transactional approach to res judicata. Thus, a claim that arises out of the same pattern of facts as a previously litigated claim is barred, whether or not the later claim rests on a different legal theory or seeks different relief. LaTrieste Restaurant & Cabaret Inc. v. Village of Port Chester, 40 F.3rd 587, 591 (1994); see also Reilly v. Reid, 379 N.E.2d 172, 176 (N.Y. 1978) ("[T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.") In addition, under New York Law, a dismissal of a prior action on statute of limitation grounds is "'on the merits' for claim preclusion purposes." Smith v. Russell Sage College, 429 N.E.2d 746, 750 (N.Y. 1981).

In the instant case, two of the claims raised in the previous action were dismissed on statute of limitations grounds, see N.Y. Civ. Prac. L. & R. § 3211(a)(5), and the balance of the claims were dismissed for failure to state a claim, see N.Y. Civ. Prac. L. & R. § 3211(a)(7). The Appellate Division affirmed the dismissal, Misek-Falkoff v. International Business Machines Corp., 556 N.Y.S.2d 331 (1st Dep't 1990), and the New York Court of Appeals denied leave to

appeal, Misek-Falkoff v. International Business Machines Corp., 561 N.E.2d 890 (N.Y. 1990). The instant action is thus precluded under New York law.

We therefore affirm.

Appellee's motion to dismiss the appeal is denied as moot.

Hon. James L. Oakes, U.S.C.J.

Hon. Ralph K. Winter, U.S.C.J.

Hon. J. Daniel Mahoney, U.S.C.J.

S.D.N.Y.(wpny)
89-cv-6269
Broderick, J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals f the Second Circuit held at the United States Courthouse in the City of New York, on the Twenty-seventh day of July, one thousand nine hundred and ninety five.

July 27 1955

Adin Falkoff,

Plaintiff-Appellant,

v.

94-7599

International Business Machine,

Defendants-Appellee.

A motion having been made herein for costs incurred on appeal, upon consideration thereof, it is ordered that appellant reimburse appellee, at the prevailing rate of 20¢ per page, the following amount: $183.61 for reproduction of 20 copies of the brief, inclusive of sales tax; $476.69 for reproduction of 13 copies of the appendix, inclusive of sales tax; and $2,143.90 for reproduction of 13 copies of the supplemental appendix, inclusive of sales tax, for a total of $2,804.20.

James L. Oakes (per RW)
Ralph K. Winter
J. Daniel Mahoney (per RW)
Circuit Judges

RKW JLO JDM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

94-7599

Misek-Falkoff & Falkoff
v.
International Business Machines Corporation

NOTICE OF MOTION
for reconsideration of an Order of this Court, dated July 27, 1995

Brief statement of the relief requested: Reconsideration of Order granting costs to appellee in light of new factors set forth, and consequent denial or significant reduction in such costs.

Adin Falkoff, pro se Plaintiff-Appellant
Date: 8/7/95

IT IS HEREBY ORDERED that the motion be and it hereby is
~~granted~~ denied

James L. Oakes (per RW)
Ralph K. Winter
SEP 11 1995 J. Daniel Mahoney (per RW)
Circuit Judge

Previous requests for similar relief and disposition:

None.

Statement of the issue(s) presented by this motion:

Should this Court reconsider its Order of July 27, 1995, which awarded costs to the appellee, and reduce or eliminate this tax on the pro se appellants?

Brief statement of the facts (*with page references to the moving papers*):

Appellant was not earlier aware of the pro se exception which allows an appellee to submit an appendix without leave of the Court, and the implications thereof. He also did not immediately recognize the contradictions between the appellee's stated purpose for their appendix, as given in a recent letter to the Court, and the actuality of their 818-page appendix.

Summary of the argument (*with page references to the moving papers*):

Appelleee submitted a two-part "Supplemental Appendix" which was both reduplicative of the appendix submitted by the appellants, and egregiously wasteful in its duplication of the record. Because this was a pro se case, the appellee was permitted to submit an appendix without leave of the Court, and intemperately included 750 pages whose inclusion is not justifiable.

By appellee's own criteria set forth in their letter of June 10, 1995, only 58 pages out of 818 should have been included in their "supplemental Appendix."

The costs calculated in the July 27, 1995, Order of this Court do not conform to the numbers in the invoice submitted by the appellee.

Linda D. MISEK-FALKOFF and Adin Falkoff, Plaintiffs
v.
INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant
No. 89 CIV 6269(VLB)
United States District Court, S.D. New York
May 13, 1994
MEMORANDUM ORDER

BRODERICK

I

The complaint in this case alleges placement of plaintiff employee Linda D. Misek-Falkoff[1] on permanent disability status by International Business Machines Corporation ("IBM"), the defendant employer (the "employer") in violation of Section 504 of the Rehabilitation Act of 1973 (the "Act"), 29 USC 794. Primarily involved is an issue of res judicata. Absent res judicata there are issues of whether plaintiff was "otherwise qualified" to retain her job[2] within the meaning of the Act and if so whether the defendant employer made "reasonable accommodation" in light of plaintiff's handicaps.

Plaintiff suffered during her employment from a physical disorder related to the nervous system. Her condition caused her to be unable to work at unpredictable times. Her unavailability for work lasted for varying lengths of time, sometimes for days; she had substantial absences in connection with her physical disorder, and as the result of surgery in 1985 to alleviate the disorder.

Even when plaintiff was present in the workplace there were problems: plaintiff at times exhibited fits of rage, emotional outbursts, crying episodes and similar behavior, making it difficult if not impossible for many co-workers and supervisors to get

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[1] Adin Falkoff, plaintiff on a loss of consortium claim, is also an employee of the defendant employer. References to the plaintiff in this memorandum order pertain to Linda D. Misek-Falkoff. In light of the disposition in this memorandum order, I do not reach Mr. Falkoff's claim, which is dismissed.

[2] When on permanent disability an IBM employee is considered inactive and may not return to work.

along with her. The extent to which these episodes were directly related to, the result of, or independent of her physical condition is unclear. These difficulties increased after mid-1985.

Plaintiff claims that the employer knew about her physical condition, but that for some two years the employer harassed her and restricted her career advancement and job opportunities and eventually removed her from her position as a computer analyst and office educator. She notes that during the period of alleged harassment she received positive job evaluations. She claims that the employer's "campaign" to force her out constituted discrimination on the basis of her handicap in violation of federal law.

The employer moves for summary judgment dismissing the complaint under Fed.R.Civ.P. 56 on the grounds that plaintiff's claims are barred by res judicata,[3] and that plaintiff cannot establish a handicap discrimination claim as a matter of law.

While the employer's personnel practices were at times far from ideal and may not be fully excusable even in the difficult circumstances involved, none of these lapses suggests violation or intent to violate any of the statutory guarantees at issue in this case.

The employer's motion to dismiss is granted.

II

The employer is a leader in the development and manufacturing of computer systems. Plaintiff is a former college professor holding a Ph.D. degree with a background in computers and linguistics. Plaintiff, who is now an attorney,[4] began employment as an at-will employee with IBM in the summer of 1977, first as a senior

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[3] After this motion was fully submitted but not yet decided, plaintiff Linda Misek-Falkoff expressed a desire to "drop all lawsuits," Dkt. # 86, but in light of subsequent indications to the contrary, it appears appropriate to rule on the employer's motion for summary judgment.

[4] Plaintiff attended law school in the evening while working for the employer and earned a J.D. degree after being placed on permanent disability.

associate programmer and then as a staff systems analyst (office educator).[5]

Through at least the last seven years of her employment plaintiff suffered from sharp head pains and other symptoms associated with atypical trigeminal neuralgia, a disorder of the nervous system,[6] and she had attacks at unpredictable times. Plaintiff was in frequent communication with the employer's medical department, as were her own physicians, and plaintiff often worked "to tolerance" (that is, as much as possible) or for half-days. Plaintiff sometimes worked at home but not on a regular basis.

Beginning in 1984, plaintiff's medical condition worsened. She was frequently absent, sometimes for extended periods, due among other things to hospitalization in connection with medical tests and brain surgery in July of 1985, and to emotional reactions to work-related experiences. She received satisfactory personnel appraisals in June 1982, August 1983, September 1984, and December 1986. None of the written evaluations contained any comments in the section provided for "significant positive or negative influence on the performance of other employees." The employer claims that performance appraisals, which are made in writing, are limited to performance while actually at work and that "conditions of work" such as absences and personal conduct would not be reflected on an employee's personnel appraisal or result in an unsatisfactory evaluation "unless excessive."[7]

This may have minimal significance in the context of this particular case. There were oral criticisms by her supervisors of her ability to work with others: plaintiff was keenly aware of, and in

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[5] Plaintiff's description of her job title differs from the employer's description in that plaintiff claims she was lead office educator.

[6] At deposition plaintiff's surgeon described atypical trigeminal neuralgia as painful and difficult to diagnose.

[7] The employer's evaluation system was based on a scale of "1" to "4" in the satisfactory category, with "1" meaning "results far exceed the requirements of the job in all key areas." Plaintiff's performance in 1982 was rated "3"; in 1983 and 1984 she was rated "2"; and in December 1986 she was rated as "3."

The employer's employee manual describes ratings and pay raises as feedback on how an employee is doing. Plaintiff received a pay increase in October 1986.

fact disputed, these oral criticisms. Even prior to 1985, plaintiff and her managers had difficulty in working together,[8] and she exhibited occasional extreme emotional reactions in the workplace. Thus written memorialization of such matters would merely have been inflammatory.

In mid-1985 plaintiff's job involved designing software systems, which included working with people within her own group both at regular meetings and one-on-one as a normal part of developing each system. Her job also encompassed attending technical conferences on behalf of the employer, meetings with customers, and undergoing training to keep up-to-date in the field.

An incident triggering events leading to this lawsuit occurred on May 29, 1985.[9] When the departmental computer trainer failed to include plaintiff in a training session, an altercation erupted. The computer trainer transmitted an account to his manager and others by electronic mail alleging that plaintiff had attempted to assault him. Plaintiff vigorously denies the computer trainer's version of this incident: plaintiff claims that at most she brought her hand down "in frustration" on a table next to the place where the computer trainer was sitting, denting some slides in a binder.[10] Both employees appear to have been shaken by the incident, as was a third employee, who observed the encounter and claimed thereafter to be afraid of plaintiff.[11]

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[8] In light of the protective orders in this case, including an order dated March 25, 1992, and concern about unnecessary disclosure of medical and other potentially confidential records, materials of this nature are provided in sealed exhibits. See Sealed Exh 1 (Defendant's Notice of Motion, Exh 1 [1981-1984]).

[9] I make no findings as to who was at fault in this and any other incident set forth in this memorandum order.

[10] Plaintiff claims she immediately offered to replace the slides. See Plaintiff's Sur-reply Aff, Exh. 7 (Pl's Aff in Opposition to Defendant's Motion for Summary Judgment in Misek-Falkoff v. Keller, Index No. 17918/86, New York Supreme Court, Westchester County (1986, Guranian, J.).

[11] Contemporaneous reports of this incident include a suggestion not specifically controverted by plaintiff--that her reaction may have been due in part to unrelated events in her personal life. See Sealed Exh 2 (Defendant's Notice of Motion, Exh O).

Several weeks later, plaintiff was involved in a second incident, this time with her manager, in which plaintiff claims that the manager grabbed from plaintiff's hand a telephone which then brushed plaintiff's face. Believing that she had been assaulted, plaintiff called for help from the building security and medical departments. Immediately after this affair, the manager requested to be relieved from supervising plaintiff and was replaced by a more senior manager.

Later in the summer of 1985, plaintiff had neurological brain surgery and was out of work for three months. Upon her return in mid-October 1985, plaintiff's work location was changed in order to keep a distance between plaintiff and the other employees involved in the above incidents; she was later moved to another facility, and her job assignment was modified.

Plaintiff's managers determined that plaintiff should be handled "from a medical standpoint."[12] This approach was developed as a result of two personnel investigations, the second of which was an internal administrative employee appeals process initiated at plaintiff's request to address various of her concerns. After an extensive investigation, an investigative report prepared for the employer concluded that the computer trainer's account with respect to the first 1985 incident was accurate. The report also concluded that with respect to the second incident plaintiff's prior manager had treated her appropriately and that plaintiff had been told of the exact accusations which had been made against her by several employees. The investigative report did, however, criticize both her prior manager and a medical department physician for inconsistent treatment of plaintiff.[13]

Plaintiff disagreed with the process and the findings, and objected to any further meetings with management unless there was positive news on her behalf.

In June, 1986 plaintiff filed a state court defamation suit against the computer trainer.

In December, 1986 plaintiff became upset after a meeting with her supervisors discussing among other topics:

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[12] See Sealed Exh 2 (Def's Notice of Motion, Exh. O).

[13] See Sealed Exh 3 (Def's Notice of Motion, Exh P).

(1) her most recent performance appraisal in which her rating was reduced from "2" to "3," and

(2) the employer's provision of legal representation for the computer trainer, but not for her, in her lawsuit against him.[14]

Plaintiff claims that the employer's handling of these matters constituted "continuing harassment" that led to "a severe recurrence of her atypical trigeminal neuralgia, requiring hospital treatment." Complaint ¶ 13.[15]

In this instance and in other situations, drastically divergent perceptions of what occurred or was happening made it virtually impossible for plaintiff and her supervisors to coordinate their efforts. This is illustrated by plaintiff's version of her reason for picketing Some time in March 1987 near the employer's grounds by holding up a sign carrying a one-word message, "Why." As relayed through her physician to the employer in a document submitted to the court, this was a "subdued move" to indicate the "extreme stress connected with the suit" against the computer trainer and to "demonstrate her plight" because of the employer's provision of legal representation for the trainer.[16]

Mandatory disability had been first considered with respect to plaintiff in early 1986. Plaintiff's managers had by-passed the administrative approach leading to possible termination without benefits[17] and applied instead, in accordance with company policy,

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[14] No statute or other legal requirement has been cited relating to an employer's contributions to legal defense of employees sued by other employees because of events in the workplace.

[15] Plaintiff was absent from the workplace during most of January and February 1987. She claims that her absences were attributable to her employer's "locking her out" so that she could not return despite being "ready, willing and able." Plaintiff does not, however, specifically controvert evidence to the contrary as to portions of that time period. See Sealed Exh 4 (Def's Reply, Exh E).

[16] See Sealed Exh 5 (Plaintiff's Affidavit, Exh 28).

[17] Procedures for employer-initiated separation included an administrative track, whereby an at-will employee was given an opportunity to improve over a period of time but "conditions of employment" such as absences and personal behavior were taken into account in measuring an employee's performance.

for her placement on the employer's Mandatory Disability Insurance Plan ("mandatory disability" or "MDIP").[18]

A handwritten record of a February, 1986 medical disability panel review meeting contains the following note by an attorney: "Had no problem with case. 'Someone not unsat [unsatisfactory] today--can you force her out of business.' Yes. MDIP."[19] The reviewing authorities, however, rejected any such action on the grounds that plaintiff was just getting back from a physical illness and should be given another chance.

On March 27, 1987 plaintiff became so upset that she was carried to the medical department, and was later driven to her physician's office. In a state court action against the employer prior to this federal litigation, plaintiff characterized this incident as follows:

> . . . [Plaintiff] was called to Yorktown on or about March 27, 1987 for a technical meeting with [her manager]. Instead of discussing technical matters [the manager] angrily confronted her with charges that she was a troublemaker because she had used a public utility computer program to try and register for a PC course open to the community.
>
> Since [the computer trainer] was the registrar and had complained to management, [the manager] told this plaintiff that she was now in trouble with four managers. [He] made more cuts in her job at that point.
>
> [Plaintiff] was so emotionally distressed and exhausted by this confrontation that she collapsed in the hallway trying to leave the building, and was taken to the Medical Department quite upset about [her manager's] conduct.

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[18] I make no determination of the validity of the employer's medical assessment. Such a finding is not necessary to my decision on this summary judgment motion since I assume without deciding that plaintiff was handicapped.

[19] See Sealed Exh 6 (Pl Aff, Exh 13); Misek-Falkoff v. IBM, 144 FRD 48 (SDNY 1992).

> . . . [She returned to work] on or about April 7, 1987, following a week of hospitalization consequent to the confrontation with [her manager].[20]

Plaintiff's absences, above average at times in the past, increased in frequency beginning in late 1986. Even disregarding certain disputed absences in early 1987, plaintiff was out of the workforce because of her illnesses for more than the ten percent that would normally trigger an inquiry by the employer. Plaintiff was apparently still upset over the May 1985 altercation with the computer trainer: she was apprehensive about coming to work, and she was absent from the workplace for long periods when events or comments with which she disagreed were presented to or became evident to her.

In April 1987 medical disability was considered again based on increased absences and diminished productivity. A memorandum from plaintiff's manager-- not controverted by plaintiff--states that plaintiff's absences contributed to a five-month delay in introducing to the market a product on which plaintiff was working.[21]

In late May, 1987 plaintiff was injured in a traffic accident.[22] She reported to work but was then absent again, with the exception of a week or so in June, recuperating from the accident and taking a week's vacation, with an anticipated return of July 6, 1987.

A review by the employer in June 1987 led to a decision to place plaintiff on medical disability. In preparation for speaking with plaintiff, her personnel supervisor was advised that if she said "I want to quit," the proper response was "no matter what she says, or does, this will be handled as a medical disability income plan--not voluntary resignation."

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[20] Def's Notice of Motion, Exh E (Amended Complaint in Misek-Falkoff v. IBM, Index No. 7720/88, New York Supreme Court, Westchester County (1988, Guranian, J.) at PP 55, 56); Pl. Sur-Reply Aff at P 16.

[21] See Sealed Exh 7 (Def Notice of Motion Exh G). The manager died in the fall of 1987.

[22] The nature of plaintiff's injuries has not been specified.

On July 6, 1987 after unsuccessful attempts to meet with plaintiff, the Director of Computing Systems notified her by telephone at home that she had been placed on the employer's Medical Disability Insurance Plan on a mandatory basis and could not return to work. Plaintiff was told in a letter dated July 6, 1987 that the decision was made "in light of your medical history after careful consideration of your high absence record, your periodic disruptive, unbusiness-like conduct at work and your inability to perform the requirements of your position consistently."[23]

She was in fact placed on inactive status that day, with the option of accepting or rejecting the benefits available under the employer's disability plan. Plaintiff's benefits under the plan include 40% of salary as well as dental and medical health benefits until the age of 65, and retirement benefits thereafter. Plaintiff has accepted these benefits.

Plaintiff alleges that she suffered a nervous breakdown on the day she received notice of her placement on the disability plan, and that while hospitalized she had a heart attack.

Plaintiff asserts that the mandatory disability decision and the events surrounding it indicate that she cannot resign, but she has not attempted to do so.

The employer's handbook states under the heading "Termination of Employment":

> [The employer] has not established any specific term of employment; therefore, termination may be initiated at any time by either an employee or by management. If you initiate the separation, it is considered a voluntary resignation . . .
>
> Separation may also be initiated by management. Reasons for separation may include, but are not limited to: failing to meet [the employer's] performance, punctuality or attendance standards, engaging in misconduct or violating a company policy.[24]

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[23] Pl. Sur-reply Aff, Exh 1.

[24] Def. Reply Aff., Exh L.

III

Prior to the filing of this federal litigation,[25] plaintiff brought three cases in state court against the employer and/or its employees in connection with the events set forth above:

1. In June 1986, plaintiff sued the computer trainer for defamation and intentional infliction of emotional distress relating to the May 29, 1985 incident; the computer trainer counterclaimed alleging assault.[26] The case was dismissed by the lower court in 1988. In September 1989 the state appellate court affirmed the lower court's dismissal of the claims for intentional infliction of emotional distress and slander but reversed a granting of summary judgment on other claims relating to defamation. 153 A.D.2d 841, 545 N.Y.S.2d 360 (2d Dep't 1989). On remand, the case went to trial in October 1993 with respect to the surviving claims and the complaint was dismissed. Plaintiff's appeal of that decision is pending.[27]

2. In May 1988, plaintiff sued the employer and one of her former managers in state court, alleging that during the three years prior to her being placed on disability the defendants had "engaged in a campaign of tortious infliction of emotional distress" against her.[28] This case was assigned to the same state court judge as the suit against the computer trainer cited above. The appellate court affirmed the lower court's dismissal of plaintiff's claims, 162 A.D.2d 211, 556 N.Y.S.2d 331

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[25] On July 10, 1989, plaintiff filed a complaint identical in all respects to the present complaint but naming in addition to the employer five of its employees (89 Civ 4663), see Def Reply Aff, Exh B; this complaint was neither served nor amended. Instead, the complaint in the present case (89 Civ 6269) naming only the employer was filed as a new action on September 22, 1989.

[26] Misek-Falkoff v. Keller, Index No. 17918/86, New York Supreme Court, Westchester County (1986, Guranian, J.)

[27] Letter from William E. Weber, Dec 1, 1993, Dkt # 90 at 2.

[28] Misek-Falkoff v. International Business Machines Corporation, Index No. 7720/88, New York Supreme Court, Westchester County (1988, Guranian, J.)

(1st Dep't 1990). The New York Court of Appeals denied an appeal, 76 N.Y.2d 708, 560 N.Y.S.2d 990, 561 N.E.2d 890 (1990) (Table).[29]

3. In July 1988, plaintiff brought an action against the employer seeking an injunction compelling the employer to train her and permit her access to and use of the employer's computer facilities and personnel so that she personally could search for and retrieve massive amounts of allegedly personal data that she had placed in the employer's computer systems. This lawsuit was dismissed in April 1991 but the employer was enjoined from destroying any of plaintiff's records.[30] An appeal is pending.

VI

The employer seeks to dismiss plaintiff's claims on the grounds of res judicata, based on plaintiff's prior state court action, Misek-Falkoff v. International Business Machines Corporation, Index No. 7720/88, New York Supreme Court, Westchester County (1988, Guranian, J.), (the "May, 1988 state court lawsuit"), in which plaintiff's claims have been dismissed with finality.

Congress has provided that a state court's judgment shall have the same full faith and credit in federal court as in the courts of the state. 28 USC 1738 mandates that a federal court apply,

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[29] On October 13, 1993, after obtaining new counsel, plaintiff applied to the state court judge for relief under N.Y. CPLR 5015(a) apparently from that judge's dismissal of both the case against the computer trainer and the employment action against the employer, both cases having been originally decided by him. Plaintiff alleged that certain documents, uncovered later during discovery in this federal litigation, raised questions as to plaintiff's employment-at-will status, and were fraudulently withheld from the state court by the employer.

Plaintiff's application was denied as untimely and on the merits on the grounds that the information would not have changed any decision.

[30] Misek-Falkoff v. International Business Machines Corporation, Index No. 9938/88, New York Supreme Court, Westchester County, N.Y. Law Journal, May 9, 1991.

where appropriate, the state court's standard of res judicata.[31] See Migra v. Warren City School District Bd. of Education, 465 U.S. 75 (1984); Burgos v. Hopkins, 14 F3d 787, 790 (2d Cir 1994); Antonsen v. Ward, 943 F.2d 198 (2d Cir 1991). The preclusive effect of a failure to raise a civil rights claim that could have been but was not raised in an earlier state proceeding that went to judgment is similar to that concerning any other claim. Migra, 465 U.S. at 83-85 (42 USC 1983).

New York law uses a pragmatic analysis for testing whether a succeeding lawsuit is barred because based on the same set of underlying facts. Smith v. Russell Sage College, 54 NY2d 185, 445 NYS2d 68, 71, 429 NE2d 746 (1981). A cause of action which cannot be revived once dismissed "may denote one of several separately stated claims in a pleading based on the same congeries of facts but related to different legal theories of recovery. A 'cause of action' may also denote a separately stated claim on the same congeries of facts, but for different legal relief. But even if there are variations in the facts alleged, or different relief is sought, the separately stated 'causes of action' may nevertheless be grounded on the same gravamen of the wrong upon which the actions is brought." Smith, 445 N.Y.S.2d at 71, quoting Matter of Reilly v. Reid, 45 N.Y.2d 24, 407 N.Y.S.2d 645, 648, 379 N.E.2d 172 (1978).

Even when different legal theories depend on "shadings of the facts, or would emphasize different elements of the facts or would call for different measures of liability or different kinds of relief," Smith, 445 N.Y.S.2d at 71, the subsequent claim may be barred. The analysis depends on how "the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether ... their treatment as a unit conforms to the parties' expectations or business understanding or usage." Id.

The underlying factual allegations as to the conduct of the employer were substantially identical in the state court litigation filed against the employer in May, 1988 and in this later federal case. No new facts not in existence or known to the plaintiff in 1988 were alleged in this subsequent federal action, see 175 East

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[31] The distinctions between different forms of preclusion such as claim, issue, res judicata narrowly defined, and related doctrines need not be discussed here.

75th Corporation v. Hartford Accident & Indemnity Co., 51 N.Y.2d 585, 435 NYS2d 584, 590, 416 NE2d 584 (1980).

The amended complaint in the May, 1988 state court action alleged a "campaign" of harassment beginning in 1984, one year further back in time than is alleged in the present federal complaint but including the May and June 1985 incidents and details of plaintiff's interaction with her managers over the next several years. The state complaint referred to plaintiff's "brain stem surgery" to ameliorate her neurological condition, and set forth facts relating to plaintiff's being placed on permanent disability without her knowledge. Allegations in that complaint also included the employer's telephone call to her on July 6 1987, and plaintiff's reaction to these events resulting in an alleged nervous breakdown and heart attack.

Plaintiff's first two claims in the May, 1988 state court action were dismissed on statute of limitations grounds pursuant to N.Y. CPLR 3211(a)(5). Limitations of actions, often called procedural, "in a practical sense may also be said to be substantive." Smith, 445 N.Y.S.2d at 72; see Koeppel v. Wachtler, 183 AD2d 977, 583 NYS2d 977, 978 (2d Dep't 1992). The balance of plaintiff's claims in the state court action were dismissed, based on the pleadings, for failure to state a claim under NY CPLR 3211(a)(7). The dismissal was not merely because of technical pleading defects but on the merits. Feigen v. Advance Capital Mgt. Corp., 146 AD2d 556, 536 NYS2d 786, 788 (1st Dep't 1989); see Slavin v. Fischer, 160 AD2d 934, 554 NYS2d 659, 661 (2d Dep't 1990). Plaintiff did not seek to replead, although she was aware that discrimination based upon handicap was a basis for legal action.[32] There is nothing in the record, nor has any authority been cited or found, to suggest that plaintiff's claim under the Act, or her pendent state claims, could not have been pursued in the 1988 state court action.

Plaintiff's state court action has been brought to a final conclusion by the ruling of the state's highest court. Misek-Falkoff v. International Business Machines, 76 N.Y.2d 708, 560 N.Y.S.2d 990, 561 N.E.2d 890 (1990) (Table). And even had the

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[32] See complaint in this action, ¶ 14 ("In or about April 1985, [plaintiff] began to inquire of [the employer] whether she might be a person with handicaps within the meaning of the ... Act.")

1988 state court suit not been dismissed, the current factually duplicate lawsuit would be improper under Smith.

Not only could plaintiff here have raised all of her claims in state court; she also had the choice of proceeding initially in federal court, an option she failed to exercise. Migra v. Warren City School District Bd. of Education, 465 U.S. 75, 85 n 7 (1984). Thus even if based on different theories or seeking a different remedy, this federal action is barred. To permit plaintiff to proceed with this action would defeat the purposes of claim preclusion. It would permit a disappointed litigant to resort to federal court to trump the state judicial system where the litigant chose to bring the initial litigation and fully exercised the opportunity to litigate the case. See O'Brien v. City of Syracuse, 54 N.Y.2d 353, 445 N.Y.S.2d 687, 688, 429 N.E.2d 1158 (1981).

Thus plaintiff's federal claim in this action, barred by principles of res judicata, is dismissed.

Under Smith, 445 N.Y.S.2d at 71, plaintiff's claims asserting discrimination in violation of New York Executive Law 296(1)(a) and New York Civil Rights Law 40-c are also barred. Were that not the case, having dismissed the federal discrimination claim I would decline to assert supplemental jurisdiction over plaintiffs' state law claims. See 28 USC 1367(c)(3); see also note 1 above.

V

Summary judgment on the merits of claims is appropriate if there are no genuine issues of material fact and the moving party establishes its right to judgment as a matter of law. Fed.R.Civ.P. 56(c); Tri-Star Pictures, Inc. v. Leisure Time Production, B.V., 17 F3d 38, 42-43 (2d Cir 1994). In order to defeat a motion for summary judgment properly supported by the moving party, the non-moving party must establish a genuine issue of material fact. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). The purpose of the motion is to determine whether there is a genuine issue requiring a trial. A genuine issue of material fact exists if "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see Converse v. General Motors Corp., 893 F.2d 513, 514 (2d Cir 1990).

The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Anderson, 477 U.S. at 247-48 (emphasis in original). The non-moving party may not defeat a motion for summary judgment by relying "simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." Ying Jing Gan v. New York, 996 F.2d 522, 532 (2d Cir 1993); SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir 1978). The nonmoving party bearing the burden of proof on the issue at trial must designate "specific facts showing that there is a genuine issue for trial." Celotex v. Catrett, 477 U.S. 317, 324, quoting Fed.R.Civ.P. 56(e). At the same time, all ambiguities must be resolved and reasonable inferences drawn in favor of the nonmoving party. In re Chateaugay Corp., 10 F3d 944, 957 (2d Cir 1993); Knight v. United States Fire Ins. Co., 804 F.2d 9, 11 (2d Cir 1986), cert. denied 480 U.S. 932 (1987).

VI

Summary judgment is granted with respect to plaintiff's claim under the Rehabilitation Act.

The Rehabilitation Act (the "Act"), 29 USC 701 et seq., reflects the concern of Congress with "protecting the handicapped against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps.'" School Bd of Nassau County v. Arline, 480 U.S. 273, 279 (1987). A primary purpose of the Act is to "deter discrimination against handicapped individuals and to expand their employment opportunities and their integration into society." Gilbert v. Frank, 949 F.2d 637, 639-40 (2d Cir 1991). This broad framework does not, however, prevent an employer from making decisions "based on the job-related attributes of a person's handicaps." Teahan v. Metro-North Commuter R. Co., 951 F.2d 511, 513 (2d Cir 1991), cert. denied 113 S Ct 54, 121 L.Ed.2d 24 (1992).

Plaintiff's job was a sensitive one requiring intensive cooperation with other staff members and reliability in performing under time constraints. Does prohibited discrimination arise where a handicapped employee, qualified to perform the technical functions of her job but unable to get along with coworkers and management or to perform effectively in a timely manner, is placed on mandatory inactive status?

To establish a prima facie case under Section 504 of the Act, 29 USC 794, plaintiff must show that at the time of placement on permanent disability she was (1) handicapped within the meaning of the Act, (2) "otherwise qualified" to perform the essential functions of her given position, (3) placed on inactive status solely by reason of her handicaps, and (4) that the employer was a recipient of federal financial assistance.[33] 29 USC 794; see Bates v. Long Island RR, 997 F.2d 1028, 1035 (2d cir), cert. denied 114 S Ct 550, 126 L.Ed.2d 452 (1993); Doe v. New York University, 666 F.2d 761, 7741-76 (2d Cir 1981).

The Act defines a "handicapped" person as an individual "who (i) has a physical or mental impairment that substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 USC 706(7)(11). Work qualifies as a major life activity if the individual is significantly restricted in ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. See Doe v. New York University, 666 F.2d at 775; 45 CFR 84.3(j)(2)(ii).

Plaintiff's position is that her handicap was limited to her neurological disorder and that she was discriminated against on that basis. For purposes of ruling on this motion, I assume that plaintiff was handicapped.

Was plaintiff qualified to perform the essential functions of her position, despite disability? See School Bd of Nassau County v. Arline, 480 U.S. 2.173, 285 (1987) ("the definition of 'handicapped individual' is broad, but only those individuals who are both handicapped and otherwise qualified are eligible for relief")

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[33] The employer does not challenge this fourth element of plaintiff's claim.

(emphasis in original); Doe v. New York University, 666 F.2d 761, 775 (2d Cir 1981). The Supreme Court has interpreted the phrase "otherwise qualified" to refer to "one who is able to meet all of a program's requirements in spite of ... handicap." Arline, 480 U.S. at 287 n 17; Gilbert v. Frank, 949 F.2d 637, 641 (2d Cir 1991).

To be qualified, the individual must satisfy the requisite skill, experience, education and other job-related requirements of the employment position and must be able to perform the essential functions of the position, with or without reasonable accommodation. Arline, 480 U.S. at 287 n 17; 45 CFR 84.3(k) (1985); Gilbert, 949 F.2d at 641; Matzo v. Postmaster General, 685 F Supp 260, 263 (DDC 1987), aff'd 861 F.2d 1290 (DC Cir 1988).

In the present case, plaintiff satisfied the skill, education and experience requirements of the job. Plaintiff's performance appraisals did not indicate any problems or deficiencies in those areas and indeed did not mention outbursts or difficulties in getting along with other people at the workplace.

Where dismissal is based on factors covered by a positive job appraisal, the appraisal becomes suspect, as do the articulated reasons for dismissal. One may draw the inference that the reasons given are pretextual and that the employee was in fact fired (or in this case placed upon permanent disability) because of her handicap. See Ostrowski v. Atlantic Mutual Ins Companies, 968 F.2d 171, 182 (2d Cir 1992).

The employer's personnel policy encompassed two separate types of employee evaluation, one being periodic written appraisals of job performance based on the employee's duties and responsibilities, and on goals to be achieved on the job, including significant positive or negative influence that the employee had on the job performance of others. In contrast, managers were to identify separately and deal early with problems relating to "conditions of employment" including attendance and personal conduct. The employer's personnel materials indicate that conditions of employment were generally considered to be those which did not impact the technical aspects of performance.[34]

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[34] Plaintiff points out that the employer's personnel policy requires managers to make early identification of problems with regard to conditions of employment, and to make efforts to rectify them.

Whether or not plaintiff was "otherwise qualified" to perform the essential functions of the job turns on the significance of absences and interpersonal relations, factors the employer cites as the basis for decline in plaintiff's ability to perform, and as the reasons for her ultimate removal from active employment, in light of the employer's official job description for a staff systems analyst and office educator. See Overton v. Reilly, 977 F.2d 1190, 1195 (7th Cir 1992) (employer's job description relevant to determination of essential functions of the job); Schmidt v. Bell, 1983 WL 631, *9, 33 Fair Empl Prac Cas (BNA) 839 (DC Pa 1983) ("Deference must be given to the decision of those persons who are in the best position to evaluate whether the individual is able to fulfill the essential functions of the position in spite of the handicap."); EEOC Title I Regulations (employer's judgment as to what the essential functions of the job are can be considered).

By plaintiff's own definition of her duties at deposition, her actual presence in the workplace and predictable availability were essential so that projects could be developed against deadlines important to the employer; so that new systems could be tested in collaboration with other employees; and so that plaintiff was available to attend planning meetings and training sessions. "Some degree of regular, predictable attendance is fundamental to most jobs," Walders v. Garrett, 765 F Supp 303, 310 (ED Va 1991), aff'd 956 F.2d 1163 (4th Cir 1992), and particularly to a job in an organizational setting in which assignments may require team interaction for project development within a timeframe relating to marketing of the product.

What is most significant, however, is not absences as such, but whether or not the job is completed in a timely manner in light of the work involved. See United States EEOC v. AIC Security Investigation, Ltd., 820, F Supp 1060, 1064 (ND Ill 1993) ("What is material is that the job gets done ... This is necessarily a fact intensive determination.") Plaintiff was supposed to function as a component of a research facility developing and testing technically sophisticated products.

It is certainly a "job-related requirement" that an employee, handicapped or not, be able to get along with co-workers and supervisors. Thus, conduct associated with a handicap, as distinct from the handicap itself, may be relevant to the determination of whether a person is qualified. Teahan v. Metro-North Commuter R.

Co., 951 F.2d 511, 517 (2d Cir 1991), cert. denied 113 S Ct 54, 121 L.Ed.2d 24 (1992); see Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402, 1408 (5th Cir 1983).

An employer may certainly require an employee's presence at the workplace when interaction with others is essential to the task to be performed; the employer may also require that employees, whether handicapped or not, not cause, or contribute to, undue interruptions and hostility in the workplace. See Schmidt v. Bell, 1983 WL 631, *14, 33 Fair Empl Prac Cas (BNA) 839 (DC Pa 1983) ("Mr. Schmidt's post traumatic stress disorder is manifested by his resentment of any type of authority. . . . His volatile, explosive personality is exacerbated under stress and [his job] is inherently stressful. His handicap presents an insurmountable barrier to his employment.").

Plaintiff denies that she was the cause of the 1985 disruptions. She does, however, admit to at least one physically aggressive act in May 1985; to on- going disagreement with her managers and other employees; to unwillingness to cooperate with management decisions as to how to resolve past incidents; and to mistrust of her managers after learning that the employer provided legal services to the computer trainer in connection with her suit against him. She was concededly absent from the workplace for extended periods of time. See Guice-Mills v. Derwinski, 967 F.2d 794, 798 (2d Cir 1992) (head nurse unable to come to work until two hours after others because of disability not "otherwise qualified" because no management person would be available).

These factors are sufficient to support the employer's action, unless the employer's ultimate decision was a pretext for discrimination against plaintiff on the basis of handicap. See St. Mary's Honor Center v. Hicks, 113 S Ct 2742, 125 L Ed2d 407 (1993); Doe v. Region 13 Mental Health-Mental Retard. Com'n, 704 F.2d 1402, 1408-09 (5th Cir.1983); Carr v. Barr, 1992 WL 159191, *4 (DDC 1992).

One fact in the record which may support plaintiff's contention that some inappropriate factor--although not necessarily plaintiff's handicap--was in the minds of some of the employer's personnel is a notation in a document made by a single member of the first disability panel review committee in February 1986, stating: "Had no problem with case. 'Someone not unsat [unsatisfactory] today--can you force her out of business.' Yes. MDIP." See Misek-

Falkoff v. International Business Machines, 144 FRD 48, 49 (SDNY 1992).

In context, however, the notation is not persuasive of discriminatory intent. The company's decisionmakers creditably rejected this suggestion in 1986, and plaintiff continued to be an employee. It was not until more than a year later, in June 1987, that the decision was taken to place plaintiff on disability: in the interim additional persistent problems had been experienced with plaintiff not related to technical competence but to inability to get along in the workplace, and to unpredictable, extended absences from the workplace.[35]

Where there are external indications of serious difficulties in the interaction between an employee and other employees and staff of the employer, as is the case here, the reality of perceptions of the supervisors, regardless of the correctness of those perceptions, presents a problem for the employer.[36]

If reasonable accommodation can enable an otherwise qualified plaintiff to perform the essential functions of a job, the plaintiff must provide it. School Bd of Nassau County v. Arline, 480 U.S. 273, 287 n 17 (1987); Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir 1991); Treadwell v. Alexander, 707 F.2d 473, 477 (11th Cir 1983).

Accommodation is not reasonable if it "either imposes 'undue financial and administrative burdens,' or requires a 'fundamental alteration in the nature of [the] program.'" Arline, 480 U.S. at 287 n 17, quoting Southeastern Community College v. Davis, 442 U.S. 397, 411, 412 (1979).

A plaintiff has the initial burden of coming forward with at least a facial showing that the handicap can be accommodated. Gilbert, 949 F.2d at 6,42. Plaintiff asserts that she could be accommodated by being permitted to work at home, which appears at first glance to be reasonable because the employer's business is computer research and development.

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[35] Plaintiff has complained that she did not have advance notice of the possibility that she would be found to be disabled. Lack of such notice could justify criticism of the employer's policy, but notice would not have had any possibility of resolving the problem.

[36] See Sealed Exh 7 (Def's Notion of Motion, Exh G).

Work at home does not create total insulation from supervisors or coworkers. Personal contact would still be required at critical junctures, triggering chances of recurrent outbursts. Plaintiff required training, and a trainer could not effectively provide training to plaintiff at home and, in any case, teaching requires the type of interaction that is at issue here. An employer is not required to accommodate a disabled employee by eliminating one Of the essential functions of a job. Gilbert, 949 F.2d at 642; Hall v. United States Postal Service, 857 F.2d 1073, 1078 (6th Cir 1988); Jasany v. United States Postal Service, 755 F.2d 1244, 1250 (6th Cir 1985).

The employer made reasonable accommodations by allowing plaintiff to rest in the medical department during the day, to park in handicapped parking areas whenever requested, to take extended absences for medical reasons, and to work part-time and "to tolerance" as needed. The employer also changed her office from time to time at her request, and permitted her to attend law school at night although she was not always coming to work during the day.

Plaintiff has asserted that these accommodations were inadequate and unacceptable. A plaintiff may not, however, complain successfully about the employer's choices if reasonable. "That [the employer] could have provided a different set of reasonable accommodations or more accommodations does not establish that the accommodations provided were unreasonable or that ... additional accommodations were necessary." Wynne v. Tufts Univ. School of Med., 1992 WL 415077 (D Mass 1992), aff'd 976 F.2d 791 (1st Cir 1992), cert. denied 113 S Ct 1845, 123 L Ed 470 (1993).[37]

SO ORDERED

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[37] Plaintiff has asserted that the process by which the employer removed her from active employment meant that she was unable to resign and that her status as an at-will employee was thereby abrogated.

Under Murphy v American Home Products Corp., 58 N.Y.2d 293, 461 NYS2d 232, 235, 448 NE2d 86 (1983), an at-will employee in New York may be discharged for cause or no cause, "absent a constitutionally impermissible purpose, a statutory proscription, or an express limitation in the individual contract of employment." Id., 461 NYS2d at 737.

In keeping with the Thirteenth Amendment ban on involuntary servitude, the employer had no authority to prevent the plaintiff from resigning, although the employer was not obligated to provide benefits if plaintiff resigned.

Dated: White Plains, New York
May 13, 1994

VINCENT L. BRODERICK, U.S.D.J.

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INDEX OF SEALED COURT EXHIBITS TO MEMORANDUM ORDER

Exhibit No.	Footnote	Source
1	8	Def's Notice of Motion, Exh I
2	11, 12	Def's Notice of Motion, Exh O
3	13	Def's Notice of Motion, Exh P
4	15	Def's Reply Aff, Exh E
5	16	Pl's Aff, Exh 28
6	19	Pl's Aff, Exh 13
7	21, 36	Def's Notice of Motion, Exh G

(CITE AS: 144 F.R.D. 48)

Linda D. MISEK-FALKOFF and Adin Falkoff, Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.

No. 89 Civ. 6269 (VLB).

United States District Court,

S.D. New York.

Sept. 29, 1992.

Plaintiff objected to discovery rulings of magistrate. The District Court, Vincent L. Broderick, J., held that: (1) minutes of meeting of panel were not within attorney-client privilege, and (2) psychiatric examination of plaintiff could not be disclosed to defendant's employees.

Ordered accordingly.

[1] WITNESSES k204(1)

410k204(1)

Fact that attorney's name appeared in minutes for meeting of panel and that it contained notation that employee could be terminated did not bring the minutes within the attorney-client privilege.

[2] WITNESSES k198(1)

410k198(1)

Attorney-client privilege is narrowly construed, applying only where necessary to achieve its purpose.

[3] WITNESSES k205

410k205

Attorney-client privilege applies only to confidential communications between attorney and client relating to legal advice.

[4] WITNESSES k198(1)

410k198(1)

Fact that person is an attorney does not make everything said between that person and a client privileged.

[5] WITNESSES k201(2)
410k201(2)
Attorney-client privilege does not apply when client seeks legal advice or services in furtherance of future wrongdoing.

[6] FEDERAL CIVIL PROCEDURE k1615.1
170Ak1615.1
Formerly 170Ak1615
Although some aspects of plaintiff's emotional health might be relevant to issue of employment and could be used to extent necessary, information in transcript of psychiatric examination which contained personal information that could be harmful and irrelevant regarding fitness for continued employment could not be disclosed to employer's other employees.

*48 Donald L. Sapir, White Plains, N.Y., for plaintiffs.

*49 R. Scott Garley, Seward & Killel, New York City, for defendants.

MEMORANDUM ORDER

VINCENT L. BRODERICK, District Judge.

By Order dated January 6, 1992, I assigned supervision of discovery to United States Magistrate Judge Mark D. Fox. Plaintiffs have raised objections to two discovery rulings rendered by Magistrate Fox on May 28, 1992: a) upholding objections by defendant IBM to requests for production of a portion of minutes of an IBM meeting, and b) permitting internal dissemination of a report of a psychiatric examination of plaintiff Dr. Misek-Falkoff.

I.

Plaintiffs argue that IBM may not assert the attorney-client privilege regarding a portion of the minutes of a February 19, 1986 meeting of an internal IBM panel concerning the IBM Medical Disability Income Plan ("MDIP"), plaintiff's deposition Exhibit 88, which the Magistrate Judge ruled could be withdrawn from production. Plaintiffs claim that there is no proven nexus between the appearance of an attorney's name in the minutes, and the minutes themselves, to substantiate that

there was a confidential communication. Alternatively, plaintiffs argue that IBM has waived the privilege by producing the document.

Defense counsel produced this document along with others in response to plaintiff's discovery demand. Defendant asserted the attorney-client privilege one month later upon learning that one of the parties mentioned in the minutes was an attorney, Gus Borgeson, employed by IBM in the Armonk office. IBM asserts that Mr. Borgeson was occasionally consulted on MDIP matters when the IBM attorney assigned to the panel, P.J. Danilowitcz was unavailable. It is IBM's contention that since Mr. Danilowitcz was not in attendance at the February 19, 1986 meeting, Mr. Borgeson's name most likely appears in the minutes because he was consulted for legal advice regarding an IBM application for involuntary MDIP benefits for plaintiff Dr. Linda D. Misek-Falkoff. Defendant further contends that production of the disputed segment of the document was inadvertent and that inadvertent production of a privileged communication does not constitute waiver of the privilege.

[1] While panel members and Mr. Borgeson state, in affidavits, that the only communication Mr. Borgeson had with the panel was to provide legal advice, no IBM submission verifies that Mr. Borgeson's name appears in the minutes for the date involved as a result of any confidential communication regarding Dr. Misek-Falkoff or any other matter. Neither is it established that the text in question, "had no problems with case--'someone not unsat today--can you force her out of business.' Yes--MDIP," can be interpreted as legal advice. I find that the text does not, as defendant contends, indicate that legal, rather than business, advice was being given. No legal issues are mentioned.

[2][3][4][5] Because the attorney-client privilege has the effect of withholding relevant information from the factfinder, the privilege is narrowly construed, applying only where necessary to achieve its purpose. Fisher v. United States, 425 U.S. 391, 402, 96 S.Ct. 1569, 1576-77, 48 L.Ed.2d 39 (1976). The privilege applies only to confidential communications between attorney and client relating to legal advice. In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1036-37 (2d Cir.1984). The fact that a person is an attorney does not make everything said between that person and a client privileged. United States v. Loften, 507 F.Supp. 108, 112 (S.D.N.Y.1981). I can find no basis on which to affirm the ruling that the extract of the minutes is, in fact, a privileged communication between an attorney and client. The ruling that the attorney-client

privilege justifies withholding from plaintiff's deposition Exhibit 88 merely on the ground that an attorney's name was included in the minutes of a meeting, without substantiation of confidential communication, was clearly erroneous and is *50 reversed. [FN1]

FN1. Should the attorney-client privilege otherwise be successfully invoked, the text involved indicates that the question of future wrong would have to be considered. The privilege does not apply when a client seeks legal advice or services in furtherance of future wrongdoing. The Supreme Court has indicated that the attorney-client privilege must "... cease to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." United States v. Zolin, 491 U.S. 554, 562-63, 109 S.Ct. 2619, 2626, 105 L.Ed.2d 469 (1988) (emphasis in original).

II

[6] Plaintiffs also object to denial of their application to limit the scope of individuals who may be permitted to review the transcript with respect to Dr. Misek-Falkoff's psychiatric examination by Dr. Andrew E. Skodol, an expert retained by IBM. On May 7, 1991 Magistrate Judge Fox ruled that the transcript would be afforded confidential status in accordance with my March 25, 1992 Stipulation and Order of Confidentiality with Respect to Certain Medical Records. Plaintiffs requested that physicians and nurses employed or retained by the IBM medical department be excluded from the review, emphasizing the highly sensitive and personal nature of the examination and expressing a desire to protect their privacy against unnecessary intrusion. The Magistrate Judge denied the request with the understanding that the transcript would be given only to those medical personnel whom the defendant would call as witnesses at trial.

In its Memorandum in Opposition to Plaintiffs' Objections to Magistrate Judge Fox's Discovery Rulings, IBM contends that it has a right to use the transcript of its own inquiry and to "show and discuss with its medical witnesses--whether fact witnesses or expert witnesses--anything counsel believes will assist in defending IBM's interests." IBM further maintains that plaintiffs' concern to protect Dr. Misek-Falkoff's privacy within the work environment and her community is not a sufficiently compelling reason for limiting IBM's use of a sensitive and probing transcript.

Paragraph 5 of the March 25, 1992 Stipulation and Order with Respect to Certain Medical Records affords an opportunity for any

party to request a further restriction in the transcript's scope of review:

> "In the event that any party wishes to obtain exemption for any Confidential Matter from any of the terms of this Stipulation and Order, and the parties are unable to agree on the exemption, either party may apply to the Court for appropriate relief."

Communications between a patient and a psychologist, psychiatrist or psychotherapist are usually much more intensely personal than those with physicians and other doctors. Disclosure of such communications and diagnoses could be considered embarrassing and an intrusion into one's privacy, and could cause harm to one's status in the workplace. In determining whether to permit the release of sensitive documents for particular uses in litigation, In re John Doe (U.S. v. Diamond), 964 F.2d 1325 (2d Cir.1992), recognizes a court's need to balance an individual's privacy rights against the litigation needs of opposing counsel.

The medical transcript includes the type of intensely personal communications that the psychotherapist-patient privilege is designed to protect from intrusion by third parties. While some aspects of plaintiff's emotional health may be quite relevant to the issue of employment by IBM, and hence should be allowed to be used to the extent necessary to assure a just presentation at trial, the transcript with respect to the psychiatric examination includes personal information that may be harmful and, in some instances, irrelevant regarding fitness for continued employment.

IBM's expert, Dr. Skodol, was retained to conduct a psychiatric examination and to render an opinion to IBM for purposes of this litigation based on that examination and, perhaps, on a review of other appropriate relevant medical materials which IBM possesses. Dr. Skodol can testify at trial based on the examination to the extent *51 necessary. While release of the transcript to other IBM personnel does not necessarily mean the information will not remain confidential, there is a high risk that it may not. Disclosure to other persons is not reasonably necessary for accomplishing the purpose for which Dr. Skodol was consulted. Cf. Simpson v. Braider, 104 F.R.D. 512, 519-521 (1985) (possibility of injury caused by disclosure of psychiatric information far outweighs the resulting benefit to justice in an individual tort suit).

There is no compelling reason why physicians and nurses of the IBM internal medical department need view the transcript. The risk of invasion of privacy and resultant injury to the plaintiff outweighs any benefit IBM claims would be obtained by releasing the information to staff of the Medical Department.

By limiting the scope of review of the transcript, the court is not placing an undue burden on IBM in accomplishing its objectives. Cf. Dole v. Service Employees Union, 950 F.2d 1456, 1462 (9th Cir.1991) (to the extent that a party may accomplish its objectives and still comply with the court's discovery limitations, those limitations constitute "less restrictive means").

Dr. Misek-Falkoff appears to have been cooperative by not limiting the scope of the examination and by openly answering all questions during the examination, even those which one might find to be questionable and probing of certain personal matters which are not the subject of this action. Dr. Skodol, as IBM's psychiatric expert, should be the only party to review the transcript.

While the Magistrate Judge has been diligent in restricting review of the transcript in other respects and has relied on IBM's assertion that only those who would appear as medical witnesses for IBM would be given access, the ruling that the March 25, 1992 Stipulation and Order with Respect to Certain Medical Records was sufficient, without further restriction, to protect Dr. Misek- Falkoff's privacy was clearly erroneous, and is modified to limit pre-trial dissemination to Dr. Skodol.

SO ORDERED.

END OF DOCUMENT

(CITE AS: 829 F.SUPP. 660)

Linda D. MISEK-FALKOFF and Adin Falkoff, Plaintiffs,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.

No. 89 CIV. 6269 (VLB).

United States District Court,

S.D. New York.

Aug. 25, 1993.

Action was brought alleging handicap discrimination in violation of Rehabilitation Act. Attorney sought charging lien against judgment or settlement and retaining lien on clients' files. The District Court, Vincent L. Broderick, J., held that attorney was not entitled to charging lien or bond.

So ordered.

See also 144 F.R.D. 48.

[1] ATTORNEY AND CLIENT k182(1)
45k182(1)

"Retaining lien" under New York common law entitles attorney who has rendered services or made disbursements on behalf of client to retain, as security for payment, client's papers and funds which are in attorney's possession.

[2] ATTORNEY AND CLIENT k174
45k174

Plaintiffs' former attorney was not entitled to retaining lien or bond in action alleging handicap discrimination in violation of federal law; authorizing lien would prolong adjudication of merits, fee-shifting statute inextricably weaved the issues with rest of litigation, and setting bond would necessitate separate inquiry into financial solvency of plaintiffs and generate side litigation. Rehabilitation Act of 1973, §§ 2 et seq., 505, as amended, 29 U.S.C.A. §§ 701 et seq., 794a; Americans With Disabilities Act of 1990, §§ 2 et seq., 505, 42 U.S.C.A. §§ 12101 et seq., 12205.

[3] FEDERAL COURTS k407.1
170Bk407.1
Federal law controls nature and extent of attorney's lien in federal question case and perhaps in all cases in federal court.

[4] ATTORNEY AND CLIENT k174
45k174
In fashioning remedies for disputes arising in course of federal litigation between attorneys and clients, federal court may determine whether assertion of retaining lien is in such conflict with important principles that it must be relinquished when balanced against considerations of public policy.

[5] ATTORNEY AND CLIENT k32(4)
45k32(4)
Where fee-shifting statute is involved, there is implicit bargain between attorneys and the public; statute provides potential source of fees to prevailing counsel, and in return counsel may not obstruct course of litigation.

[5] FEDERAL CIVIL PROCEDURE k2737.1
170Ak2737.1
Where fee-shifting statute is involved, there is implicit bargain between attorneys and the public; statute provides potential source of fees to prevailing counsel, and in return counsel may not obstruct course of litigation.

*661 William D. Frumkin, Donald Sapir, White Plains, NY, for moving attorney.

William Weber, Hauppauge, NY, for plaintiffs.

M. William Munno, Michael Enright, Seward & Kissel, New York City, for defendant.

MEMORANDUM ORDER

VINCENT L. BRODERICK, District Judge

I

This suit, initiated in 1989, alleges handicap discrimination by an employer under the Rehabilitation Act, 29 U.S.C. §§ 701 et seq., and is possibly subject to the Americans With Disabilities Act, 42 U.S.C. §§ 12101 et seq.

A motion to withdraw as counsel was filed by plaintiffs' attorney (the "moving attorney"). Before the motion was fully submitted, the plaintiffs retained new counsel. The moving attorney and plaintiff executed a stipulation substituting new counsel for the moving attorney, which stipulation was "so ordered" by me on August 2, 1993.

The pending motion presents questions as to procedures applicable with respect to withdrawing counsel in federal question cases where a critical point in the pretrial phase of the litigation has been reached and where federal fee- shifting statutes are involved.

The moving attorney seeks a charging lien against any proceeds arising from judgment or settlement in the action, and a retaining lien on the clients' files. [FN1] He also requests reconsideration of that portion of an order dated June 9, 1993 which provided that determination of his attorney's fees would be postponed until resolution of the case; he seeks a summary determination of fees and expenses on an expedited basis.

FN1. The moving attorney's motion initially requested only a charginglien; his reply affidavit characterizes the application as one for "a retaining lien and a charging lien".

*662 I grant the moving attorney's request for reconsideration with respect to the June 9, 1993 order, and I modify that order to the extent that I refer this matter to United States Magistrate Judge Mark D. Fox for a report and recommendation as to the amount, if any, of attorney's fees and disbursements due to the moving attorney (see part V below). The matter is to be considered by Magistrate Judge Fox only after defendant's motion for summary judgment has been fully submitted. [FN2]

FN2. In certain cases consistent abuse of legal counsel by a party that repeatedly fails to pay amounts due might warrant other remedial procedures, see, e.g., Harrison Conference Serv. v. Dolce, 806 F.Supp. 23, 27 (E.D.N.Y.1992), but

the dispute over fees here does not outweigh the need to avoid delay at this stage of the litigation.

I deny the application for a retaining lien. The moving attorney is directed promptly to transfer the files in this case to plaintiffs' present counsel. I do not require that plaintiffs post a bond, for the reasons discussed in part IV below.

In light of the delay resulting from the withdrawal and substitution of counsel, plaintiffs' sur-reply with respect to the summary judgment motion is to be filed by October 22, 1993. [FN3]

FN3. Plaintiffs' memorandum of law may not exceed 15 pages, pursuant to my order dated June 9, 1993.

II

The complaint in this case was filed in September 1989 with the moving attorney as plaintiffs' counsel of record. Some six months later, plaintiffs consented to substitution as their counsel of an attorney who left the moving attorney's law firm. The second counsel was relieved as plaintiffs' counsel 13 months later by consent, and the moving attorney once again was retained by plaintiffs. He was permitted to withdraw upon my approval of the most recent stipulated substitution of counsel earlier this month.

A dispute over fees and disbursements arose between plaintiffs and their second attorney at the time she was relieved in early April 1991. I referred that controversy to a special master. The litigation at that time was in the early stages of discovery and the parties were engaged in efforts to achieve settlement of the case. On July 23, 1991 I approved a resolution of the controversy between plaintiffs and their second attorney.

Following payment of the agreed-upon sum to the second attorney, which was far less than the amount now asserted to be due by the moving attorney, the second attorney turned the file over to the moving attorney. [FN4] Plaintiffs' new counsel, who is also representing the plaintiffs in pending state litigation with respect to which a trial has been scheduled in early October, has indicated that materials in the federal case file are necessary to prepare for the state litigation as well as to proceed in the federal case.

FN4. The issue of whether any of the fees and disbursements now sought should include the moving attorney's initial period as counsel will be an aspect of this controversy to be determined by United States Magistrate Judge Mark D. Fox, as set forth in part V below.

In this four-year-old litigation, discovery has been completed. It involved over 33 deposition days and production of approximately 6,000 pages of documents. A summary judgment motion has been filed by the defendants and awaits only a sur-reply by plaintiffs which I have authorized. Extensive negotiations have been pursued including efforts to devise a settlement that would incorporate all outstanding litigation between the parties.

The moving attorney and the plaintiffs dispute both the nature of their fee arrangement and the amounts due. The plaintiffs oppose an early determination of fees, claiming a need to apply their time and money to the pending federal and state litigation, and they seek an extension of time to submit their sur- reply with respect to defendant's motion for summary judgment.

III

A federal court " 'may, in its discretion, exercise ancillary jurisdiction to hear fee disputes ... between litigants and their attorneys *663 when the dispute relates to the main action....' " Chesley v. Union Carbide Corp., 927 F.2d 60, 64 (2d Cir.1991), quoting Cluett, Peabody & Co. v. CPC Acquisition Co., 863 F.2d 251, 256 (2d Cir.1988) (citations omitted); see 28 U.S.C. § 1367; Jenkins v. Weinshienk, 670 F.2d 915, 918 (10th Cir 1982).

Litigation between parties and their counsel may be considered peripheral in diversity and certain federal question cases. In suits arising from federal claims where a federal fee-shifting statute in involved, the matter of attorney's fees becomes part of an inextricable whole.

This case does involve a fee-shifting statute. The Rehabilitation Act provides in 29 U.S.C. § 794a that "[i]n any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." See parallel provision in the Americans with Disabilities Act, 42 U.S.C. § 12205.

Under New York law the moving attorney would have a charging lien [FN5] against any recovery or settlement if the fee has not yet been paid for his services and disbursements, see People v. Keeffe, 50 N.Y.2d 149, 428 N.Y.S.2d 446, 448, 405 N.E.2d 1012, 1014 (1980), unless the magistrate judge decides that the attorney withdrew without good and sufficient cause, see Marrero v. Christiano, 575 F.Supp. 837, 839 (1983); Holmes v. Y.J.A. Realty Corp. v. Goldman, 128 A.D.2d 482, 513 N.Y.S.2d 415, 416 (1st Dep't 1987).

FN5. Under New York Judiciary Law § 475, an attorney has a charging lien upon the client's cause of action. The statute provides in relevant part:

From the commencement of an action ... the attorney who appears for a party has a lien upon his client's cause of action [or] claim ... which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

While in the normal case I would defer determination of the fees and disbursements due the moving attorney until the resolution of the main case to avoid injecting side issues, see, e.g., Gale v. Stallone, 1992 WL 73476 (S.D.N.Y. Keenan, J.), I depart from that approach here. In deciding to depart I have considered the length of time that the moving attorney has represented the plaintiffs, and the correspondingly large fee and disbursements that may be at issue.

IV

[1] A retaining lien under New York common law entitles an attorney who has rendered services or made disbursements on behalf of a client to retain, as security for payment, the client's papers and funds which are in the attorney's possession. See Resolution Trust Corp. v. Elman, 949 F.2d 624, 626 (2d Cir.1991), citing People v. Keeffe, 50 N.Y.2d 149, 428 N.Y.S.2d 446, 449, 405 N.E.2d 1012, 1015 (1985).

[2] Authorizing a retaining lien in this case would entail undue delay of the litigation. Such delay would prolong the adjudication of the

merits of the plaintiffs' discrimination claim, and thus I must consider the application of federal law in this federal question case, and the objectives of Fed.R.Civ.P. 1 applicable to all cases brought in federal court.

Although New York provides special circumstances under which a court may order the transfer of case files without payment or a bond, see Jenkins v. Weinshienk, 670 F.2d 915, 919-20 (10th Cir.1982) (citing New York case law); Rosen v. Rosen, 97 A.D.2d 837, 468 N.Y.S.2d 723 (2d Dep't 1983), I do not reach state law grounds in deciding on the availability vel non of a retaining lien.

[3] The nature and extent of an attorney's lien is controlled--certainly in a federal question case, and perhaps in all cases in federal court--by federal law. Pomerantz v. Schandler, 704 F.2d 681, 682 (2d Cir.1983) (per curiam), citing National Equipment Rental Ltd. v. Mercury Typesetting Co., 323 F.2d 784, 786 n. 1 (2d Cir.1963). The purposes of the relevant federal statute should prevail even if a departure from what state *664 law might otherwise provide is necessary, as Resolution Trust Corp. v. Elman, 949 F.2d 624, 627 (2d Cir.1991), makes clear. In Elman, the court determined that the right of a law firm to retain files where a retaining lien might be permissible under state law could be altered where "a federal statute ... superimposes a new arrangement over the state law scheme," id. at 627 (involving the Financial Institutions Reform, Recovery and Enforcement Act of 1989).

[4] In fashioning remedies for disputes arising in the course of federal litigation between attorneys and their clients, a federal court may determine whether assertion of a retaining lien is "in such conflict with important principles that it must be relinquished when balanced against considerations of public policy." Jenkins v. Weinshienk, 670 F.2d 915, 919 (10th Cir.1982); see Elman, 949 F.2d at 629 (the public interest in cases arising under a given federal statute outweighs the purely private interest of the law firm).

[5] Where a federal statute provides for fee-shifting, litigation invoking such a statute is intended by Congress to be for the benefit of the public as well as that of the plaintiffs; the plaintiffs function as private attorneys general. Fee-shifting inextricably interweaves fee issues with the rest of the litigation. Thus, I impose no bond requirement upon the plaintiffs. Given the amount of fees claimed to be due by the moving attorney, setting such a bond would necessitate a separate independent inquiry into the financial solvency of the

plaintiffs and generate side litigation. The fundamental purposes of legislation passed by Congress should not be derailed because a party can or cannot post a bond in connection with transfer of litigation files. Controversies between parties and their attorneys should not hold federal litigation hostage. Where a fee-shifting statute is involved, there is an implicit bargain between attorneys who undertake such cases and the public. The statute provides a potential source of fees to prevailing counsel; in return counsel may not obstruct the course of the litigation. In federal question cases of this type, retention of files should rarely if ever be permitted. [FN6]

FN6. If a retaining lien were to become an even moderately foreseeable possibility in federal question litigation, sophisticated litigants would insist on having their own copies of all papers to protect themselves against potential withholding of files. This would defeat the lien and at the same time increase the cost of the litigation. These concerns do not apply to retention of funds, as opposed to files, where the retention would not obstruct the course of the litigation.

Furthermore the weight of the objectives of Fed.R.Civ.P. 1, sentence 2 is enhanced by the proposed amendments of 1993 which appear to be uncontroversial. The amended Rule 1 calls for the courts to construe and administer the Federal Rules of Civil Procedure to enable federal litigation to proceed without undue delay. See also Judicial Improvements Act of 1990, Pub Law 101-650, 104 Stat. 5089, enacting 28 U.S.C. § 473. [FN7]

FN7. My ruling is supported by current developments in New York law, which are particularly persuasive because the issues tend to arise more frequently in the aggregate in state courts. Most recently Chief Judge Kaye of the New York Court of Appeals has announced significant innovations in the rules applicable to attorneys in matrimonial cases, scheduled to become effective on November 1, 1993. One new rule requires that a withdrawing attorney turn over files to the client within 30 days; the attorney may then apply to the court for a determination of the amount of the attorney's charging lien pursuant to New York Judiciary Law § 475. Proposed additions to Title 22, Official Compilation of Codes, Rules and Regulations of the State of New York, "Retaining Liens" (August 1993). This rule is aimed at expediting litigation where delay is frequently caused by collateral disputes between attorneys and their clients.

V

The problems posed by delay will be mitigated once the defendant's summary judgment motion has been fully submitted. At that time, determination of the attorney's fee issue may promote settlement because uncertainty about fees of the magnitude involved here may make settlement difficult.

Accordingly, the plaintiffs will notify the moving attorney and contact United States Magistrate Judge Mark D. Fox promptly after plaintiffs' sur-reply papers have been submitted.

*665 Judge Fox will make a report and recommendation to me on the following:

(1) Whether or not the moving attorney justifiably withdrew as counsel.

(2) The nature of the fee arrangement, [FN8] the amount, if any, due to the moving attorney and on what basis, whether quantum meruit or otherwise; the reasonable expectation of both parties as to whether the moving attorney's fee would be payable prior to any settlement or judgment, based on such factors as the length of time of the representation and the amount due; and understandings with respect to payment of disbursements.

FN8. I am unable to determine the agreed-upon terms of the moving attorney's representation from the papers now before me.

(3) The issue of financial hardship with respect to the plaintiffs, who have provided preliminary information suggesting insufficient funds, and the impact of any inability to pay prior to settlement or judgment.

(4) Whether or not the proceedings before him should be sealed in order to avoid unnecessary revelation of attorney-client communications.

(5) Whether or not a Fed.R.Civ.P. 54(b) certificate would be appropriate with respect to the action to be taken by me on the magistrate judge's report and recommendation. [FN9]

FN9. It is contemplated that the magistrate judge's report and recommendation will permit me to reach a complete adjudication with respect to the claims of the moving attorney, thus making any separate subsequent proceeding unnecessary.

SO ORDERED.

(CITE AS: 162 A.D.2D 211, 556 N.Y.S.2D 331)

Linda D. MISEK-FALKOFF et al., Plaintiffs-Appellants,
v.
INTERNATIONAL BUSINESS MACHINES CORPORATION et al., Defendants-Respondents.

Supreme Court, Appellate Division,
First Department.

June 14, 1990.

Action was brought for intentional infliction of emotional distress. The Supreme Court, Westchester County, Gurahian, J., dismissed, and plaintiff appealed. The Supreme Court, Appellate Division, held that allegations did not involve such egregious conduct as to sustain emotional distress cause of action.

Affirmed.

[1] LIMITATION OF ACTIONS k31
241k31
One-year statute of limitations governed cause of action for intentional infliction of emotional distress.

[2] DAMAGES k50.10
115k50.10
Defendants' alleged conduct in placing plaintiff on medical disability and in refusing to release certain personal records allegedly belonging to her but stored in computer files did not involve egregious conduct that would sustain cause of action for intentional infliction of emotional distress.

**331 N.E. Henkin, New York City, for plaintiffs-appellants.

R.S. Garley, for defendants-respondents.

*211 Before MURPHY, P.J., and MILONAS, ROSENBERGER, ASCH and RUBIN, JJ.

MEMORANDUM DECISION.

Order of the Supreme Court, Westchester County (Vincent Gurahian, J.), entered on April 12, 1989, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7), unanimously affirmed, without costs.

Plaintiff seeks recovery for infliction of emotional distress based upon various acts committed by International Business Machines Corporation (IBM) employees. The majority of these acts occurred more than one year prior to commencement of this action. Those which occurred within a year prior to commencement of the action were the placement of plaintiff on medical disability, and the refusal to release certain personal records allegedly belonging to the plaintiff but stored in IBM computer files. The latter claim is also apparently the subject of another pending action.

[1, 2] The motion court properly applied a one-year Statute of Limitations to the cause of action for intentional infliction of emotional distress (Gallagher v. Directors Guild of America, 144 A.D.2d 261, 533 N.Y.S.2d 863).

Excluding those alleged acts which were beyond the limitations period, the complaint was properly dismissed. Viewing the allegations of the complaint most favorably to the plaintiff, the conduct alleged was not so egregious as to sustain the cause of action (Murphy v. American Home Products Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86). Absent concrete factual allegations of a continuing conspiracy or concerted course of action against plaintiff, we need not reach the issue of whether, if properly pleaded, the acts more remote in time could be considered actionable as part of a "continuing" tort.

END OF DOCUMENT

(2)

FILED

95-658 OCT 16 1995

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ADIN FALKOFF -
PETITIONER

vs-

INTERNATIONAL BUSINESS MACHINES
CORPORATION -
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI: APPENDIX H

Adin Falkoff, Pro se
163 Great Oak Lane
Pleasantville, NY 10570
(914)769-3652

October 16, 1995

94-7599 / 94-7601

To be argued by:
Plaintiff-Appellants
Time Requested: 15 Minutes

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Linda D. Misek-Falkoff and Adin Falkoff,

Plaintiff-Appellants Pro Se,

- vs -

International Business Machines Corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF PLAINTIFF-APPELLANT

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Pro Se for Appellant
163 Great Oak Lane,
Pleasantville, New York 10570

United States Southern District Court Clerk's Index No. 89 civ 6269 [VLB] 1994

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STATEMENT OF THE SUBJECT MATTER AND JURISDICTION, JUDGE AND CITATIONS

An employer, defendant-respondent International Business Machines Corporation, a recipient of federal financial assistance, intentionally subjected an employee, the principal plaintiff-appellant Dr. Linda Misek-Falkoff, to adverse discrimination because of her handicaps or perceived handicaps, failed to offer reasonable accommodation to her handicaps or perceived handicaps, failed to engage in dialogue for the purpose of determining reasonable accommodations, and secretly conspired to sever and did sever the employee from activities of the workplace in a prejudicial fashion, solely on account of her handicaps or perceived handicaps, although she was otherwise qualified to perform her job, all in violation of both federal and state Civil Rights statutes. Plaintiff is presently designated an "inactive employee" and characterized as having a disability that "prevents the taking of any employment for pay or profit." She has been barred from the workplace since 1987, and brought this action seeking reinstatement to active employment and other remedies.

The United States District Court, Southern District of New York, had jurisdiction and pendent jurisdiction over claims of handicap discrimination and violations of civil rights at plaintiff-appellant's workplace, based upon the provisions of 28 U.S.C. § 1331, because they arose under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, the New York Executive Law 296(1)(a) and New York Civil Rights Law 40-c, in Westchester County, New York, within the Southern District of New York. The Docket Number in the court below is 89cv6269.

The Court of Appeals of the Second Circuit has jurisdiction in this matter based upon 28 U.S.C. § 1291, because a final judgment, following dismissal and summary judgment by Memorandum Order, was filed in the United States District Court, Southern District of New York on May 16, 1994, and notices of appeal by right were timely filed and fees paid at the USDC SDNY by the plaintiff-appellants on June 14, 1994.

The judge in the court below was the Honorable Vincent L. Broderick, and the decision on appeal has been reported in Misek-Falkoff and Falkoff v. International Business Machines Corporation,

854 F.Supp. 215 (S.D.N.Y. 1994); other reported decisions are Misek-Falkoff and Falkoff v. International Business Machines Corporation, 144 F.R.D. 48, (S.D.N.Y.1992), and Misek-Falkoff and Falkoff v. International Business Machines Corporation, 829 F.Supp. 660 (S.D.N.Y. 1993).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Preliminary Statement

This is a Civil Rights case[1] in the area of Handicap Discrimination in the workplace, wherein the employer claims that secretive decision-making, segregation, and banishment from the workplace can be an accommodation under the Rehabilitation Act and related statutes, whose primary purposes include integration of handicapped persons into society and deterrence of stereotyping, and whose implementation requires joint participation in determining suitable accommodations as well as in other matters seriously determinative of handicapped employees' status and standing in the workplace. The decision herein being appealed -- which holds that reasonable disagreement with management, and medical absences well within the bounds of an employer's documented sickness and accident benefit plan, are indicative of a handicapped persons disqualification for her job -- if allowed to stand as precedent, can only serve to chill choice or free speech for people with disabilities, and lock them out of the "marketplace of ideas." Under it, the Civil Rights thrust of the Disability laws stands to be vitiated, as Fifth Amendment equal protection and due process rights could be abrogated for employees with disabilities; especially for those with less obvious challenges, often called "hidden handicaps" in contrast with visible disabilities; and especially now, when so much of the increasingly automated American workplace is becoming more dependent upon telecommunication and the information industry, which often involves remote communications (telecommuting) and can tolerate such

[1] Plaintiffs believe that in the exercise of their constitutional rights of equal protection and due process there cannot be special interest privileged access to the courts, and that individuals stand on equal footing woth corporate entities.

handicaps -- not only tolerate them, but perhaps require such toleration, else become increasingly prone to re-instancing the gravamen (ills) instantiated by the present case.

Thus, in a work context increasingly crucial to the economy, the instant case tests generally whether secrecy and fiat by employers, rather than dialogue with a handicapped employee, can satisfy laws prohibiting discrimination and requiring integration; and specifically whether this particular employer management team violated the law by deliberately keeping from the handicapped employee knowledge of disability applications being made "on her behalf" (1985-1987), by in other ways setting up barriers to job performance and team interactions, destroying rather than preserving and improving the informational equivalent of "access ramps," and by imposing an adversely discriminatory severance from the workplace which could only be effectuated because the employee was acknowledged to be handicapped.

It also tests whether secrecy and purposeful deception can support equitable "affirmative" defenses; in particular, among other questions, whether defendants with "unclean hands" can properly invoke equitable defenses, and whether it is just and proper to grant prospective application to proceedings tainted by deliberate misrepresentation and withholding of information vital to the decision making process; and whether the rote use of only superficial criteria in applying New York's "pragmatic transactional analysis" approach to claim (or issue) preclusion is in keeping with the law, and whether such use is adequate for the satisfaction of due process and is in the interests of justice, when a closer look at the context and the totality of circumstances indicates otherwise.

In accordance with the express (since 1986) updates on Rehabilitation Act Law, a question is also raised as to the applicability of the Americans With Disabilities Act to a situation involving an "inactive employee."

Specific Questions To Be Decided

1. In determining whether a handicapped employee is "otherwise qualified" for her job, should greater weight be given to the employer's standard business records showing good performance and commendable conduct in the workplace, offered in evidence by the non-movant plaintiff, than to ad hoc hearsay documents offered by the

movant defendant alleging poor performance and behavioral problems in the workplace, purposely prepared to promote and justify questionable secret decisions detrimental to the employee? Does this disagreement in the evidentiary material present a genuine issue of material fact requiring a trial?

The district court improperly answered in the negative on both parts of this question.

2. Is it adversely impacting discriminatory treatment, as asserted by the non-movant plaintiff, to suddenly separate a handicapped employee from the workplace by secretly determining that she has a disability that "prevents the taking of any employment for pay or profit" under the terms of the employer's self-insured Medical Disability Income Plan (MDIP), and in violation of the employer's own standard procedures deliberately fail to offer her the options of resigning or being simply fired without prejudice, and then not only concealing from her the intended permanent nature of the separation but explicitly leading her to believe that she was not precluded from reinstatement to active status; or is this an accommodation within the meaning of the Rehabilitation Act, as asserted by the movant defendant, because the MDIP provides some monetary benefits?

The district court was silent on this question, but improperly ruled that if the employee was not "otherwise qualified" for her job this possibly inexcusable behavior of banishment on medical grounds by the employer could be legally supported.

3. Should preclusive force be given to prior litigation in which some of the facts used (as focus information) in that complaint are the same as facts mentioned (as background information) in the complaint in the instant case when, in addition, among other things under applicable New York law, the prior litigation was not fully litigated and had a different cause of action with completely non-overlapping requisite elements of proof? And should the plaintiffs be denied their "day in court" because they exercised their due process right to bring separate actions rather than combining the causes of action in one lawsuit?

The district court improperly ruled in the affirmative on both parts of this question.

4. Should prospective weight and preclusive force be given to prior litigation where there is evidence indicating that the decision therein was tainted because the defendant withheld information and

deliberately misled the court (and the plaintiff) on an issue material to the determination of that matter?

The district court was silent on this question.

STATEMENT OF THE CASE

The Nature Of The Case

This case claims unlawful discrimination and violation of civil rights by an employer who engaged in unequal and detrimental adverse treatment of an employee who suffered from certain medical problems which constitute handicaps as defined in 29 U.S.C. §§ 706(8)(B) and 794, and includes claims of loss of consortium by the employee's spouse who suffered such loss consequent to the discriminatory treatment complained of. For a period of about two years, the employer engaged in secret proceedings in the workplace leading to a planned stigmatized ouster of the employee based on her handicaps or perceived handicaps.

Some three years after the start of this action, the defendant moved under FRCP Rule 56(b) to dismiss the complaint on the basis of res judicata on account of an earlier case litigated in the New York Supreme Court, and to dismiss on the basis of summary judgment, claiming that the plaintiff was not "otherwise qualified" under the statutes, was not discriminated against, and that her medical condition was in fact accommodated at least to the legally necessary extent. Plaintiffs disagreed, both as to the preclusive effect of the prior litigation and as to the arguments for summary judgment, and presented evidence establishing a prima facie case and controverting each of the defendant's claims.

The District Court ruled in favor of the movant on both res judicata and summary judgment. Since res judicata alone would have sufficed to dismiss the action if it could have been properly supported by the facts and the law, it is not unreasonable to infer that the district court ruled on both because in the final analysis there is not a clear basis for dismissal in either branch of defendant's motion (nor, perforce, in both together). Indeed, the procedural records evidence that defendant itself apparently had doubts: In response to the plaintiffs' Answer to the Motion, the defendant-movant submitted a Reply covering the res judicata argument only, and also without

motion practice or stipulation by the plaintiffs replaced the original motion with a Modified Motion asking for dismissal on res judicata alone; but later defendants asked the court for leave to submit yet another Reply to the Answer, this time including the summary judgment part[2].

In any event, plaintiffs contend that in order for the district court to reach a position of granting either branch of the motion for dismissal, the arguments and evidence offered by the non-movant were improperly discounted relative to those of the movant, and ambiguities with regard to both the law and the facts were resolved inappropriately in favor of the movant[3].

The Course Of Proceedings

These lengthy proceedings commenced when the complaint was filed, and summons and Notice issued pursuant to 28 U.S.C. 636 (c) on September 22, 1989 (Docket #1). In the first of many instances wherein the defendant employer, IBM, received extensions of statutory or scheduled time, the time to answer was extended to December 20, 1989, and the actual answer was made a day later (Docket #3).

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[2] The district court denied a request by IBM to file a moving memorandum of twenty-five pages instead of ten (Docket #44), but they still managed to submit no less than four memoranda totalling forty-one pages in the course of this proceeding: "IBM's Memorandum in Support of its Motion for Summary Judgment," 10 pages, dated 9/30/92; "IBM's Reply Memorandum in Support of its Motion to Dismiss," 10 pages, dated 3/5/93; "IBM's Memorandum in Support of its Motion for Summary Judgment," 6 pages, dated 3/5/93; "IBM's Reply Memorandum in Support of its Motion for Summary Judgment," 15 pages, dated 6/3/93. Even though they did not have that much of significance to talk about, this did give them the well acknowledged "persuasive rhetoric" benefit of repetition.

[3] This is especially evident in areas of express ambiguity, where, for instance -- to give an example that occurs early in the Memorandum Order -- the court states (MO p2), "The extent to which these [complained of workplace] episodes were directly related to, the result of, or independent of her physical condition is unclear." There are also many instances of factual errors and internal contradictions in the Memorandum Order, most of which redound to the disadvantage of the plaintiff. Many of these are noted in the appropriate context in the later parts of this brief; others, which were listed as part of a Notice of Motion brought before the district court on August 26, 1994 (Docket # 106), are reproduced in the appendix to this brief.

On March 22, 1990, Anne Golden, Esq., a solo practitioner who had recently left the law firm of Donald L. Sapir, where she had worked on this case, was substituted as attorney for plaintiffs (Docket #5); and the following day a scheduling order was issued which set Discovery cutoff for September 5, 1990 (Docket #6).

On August 1, 1990, defendant IBM noticed depositions of five physicians who had treated plaintiff Dr. Misek-Falkoff as far back as 1982, and the actual depositions began two months later. (All of these personal physicians stated under oath that they did not see her as disabled from work.) Discovery of plaintiff's medical history then continued with depositions of her neurosurgeon and others, and production of hospital records, over about a year and a half.

A confidentiality order insisted upon by IBM before they would produce any discovery matter was entered on October 16, 1990 (Docket #13), and it was only subsequent to that time that plaintiffs were granted any discovery of IBM records. Starting thereafter, documents were produced by IBM in varying quantities at different times over the next two years, and depositions of current and former IBM employees were initiated. The first such deposition took place on February 22, 1991, and others continued over the next 14 months.

On April 18, 1991, Donald L. Sapir was restored as counsel for plaintiffs, and Judge Gerard L. Goettel recused himself because his son was then employed by the Sapir firm, having started there during the interval when Ms. Golden was plaintiffs' attorney (Docket #18); and on April 30, 1991, the case was reassigned to Judge Vincent L. Broderick (Docket #20).

On January 7, 1992, the case was referred to Magistrate Judge Mark Fox for supervision of all pre-trial matters, including settlement discussions[4] and discovery issues. (Docket #33).

On May 4, 1992, defendant IBM was given leave to file a motion for summary judgment by June 12, 1992 (Docket #42), which date was later extended to September 30, 1992 (Docket #55).

In the course of pre-trial discovery, Magistrate Judge Fox had occasion to formally rule in favor of the defendant on two controversial questions, regarding attorney-client privilege and confidentiality of certain medical records. Plaintiffs appealed his

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[4] The one such discussion held was actually supervised by Mr. Givens, a law clerk. See below.

decision to District Court Judge Broderick, who reversed the first ruling and modified the second in a published Order on October 1, 1992, Misek-Falkoff v. International Business Machines, 144 FRD 48 (SDNY 1992).

IBM's motion papers were filed on September 30, 1992 (Docket #s 56 57 58), and plaintiffs' answer was filed on November 5, 1992 (Docket #s 60 61 62).

On November 24, 1992, a conference was convened in Chambers by Law Clerk Givens, regarding possible terms of settlement and other matters. It came to light at a conference held before Judge Broderick on May 11, 1993, that there were several follow-up ex parte telephone conversations between Mr. Givens and defendant's attorneys, in the course of which defendant's attorneys took exception to certain views expressed by Mr. Givens, finally asserting concerns about his impartiality, whereupon Mr. Givens immediately recused himself from the case (Docket #81, Minutes of conference May 11, 1993, p6).

On March 5, 1993, IBM filed a modified Notice of Motion, two Memoranda, and a Reply (Docket #s 63-66). These papers were one hundred days late, the Reply having been due on November 25, 1992.

Apparently Mr. Givens' earlier recusal did not satisfy IBM or its attorneys for long, and they renewed their complaints six months later, at the May 11th conference, citing statements they attributed to Mr. Givens, such as "that he found certain unspecified business events and litigation events troublesom[e]" (Minutes of conference May 11, 1993, p4), and "that the fact that compulsory retirement can be used to get rid of someone on medical grounds was horrifying to him" (id p5). They then expressed concern about the "ability of the court for whatever reasons to be impartial," and pressed Judge Broderick to recuse himself, which he declined to do. (id., p15)

Also as a result of that conference, an Order issued on May 13, 1993, gave the defendant leave to file a new Reply, with an expanded memorandum, and affirmed plaintiffs' right to a sur-reply (Docket #67).

On June 18, 1993, plaintiffs' attorney Sapir brought a motion to withdraw as counsel on account of a fee dispute, and asked for a charging lien, and a retaining lien against the plaintiffs' files. Judge

Broderick decided, on August 25, 1993, against the retaining lien[5], and referred the matter to Magistrate Judge Fox to resolve and make recommendations which would enable the court to "reach a complete adjudication" of the claims, (Misek-Falkoff v International Business Machines Corporation, 829 F.Supp. 660 (SDNY 1993)). The first paragraph of this Memorandum Order reads as follows: "This suit, initiated in 1989, alleges handicap discrimination by an employer under the Rehabilitation Act 29 USC §§ 701 et seq., and is possibly subject to the Americans With Disabilities Act, 42 USC §§12101 et seq."

In a Memorandum Order dated May 13, 1994, the district court granted IBM's motion to dismiss, finding the federal claim barred by res judicata, and granting summary judgment under the Rehabilitation Act (Docket #100)[6]. A judgment was signed on May 16, 1994 (Docket #102).

Plaintiffs appeal on both branches of this judgment.

Statement Of Facts Relevant To The Issues Presented For Review

In 1985 plaintiff-appellant Dr. Linda Misek-Falkoff was then in her ninth year as an employee of the Research Division of the International Business Machines Corporation (IBM). Before being invited to IBM she had a career in academia, during which she taught and did pioneering research in the application of computers to discourse analysis in literary and medical contexts. In 1972 she received the Ph.D. degree at Case Western Reserve University, where she was also an instructor and lecturer in the departments of English and of Computers and Information Sciences. She then joined the faculty at Vassar College as an assistant professor of Computer Science Studies, and in 1977 she was recruited from that position to be a Visiting Scientist (Special Research Associate, Laboratory Automation) at the IBM Research Center in Yorktown Heights, New York.

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[5] The delay in turning over the files materially slowed down the plaintiffs' replacement attorney in his preparations for litigating the Keller case.

[6] No substantive proceedings were held by Magistrate Judge Fox before the dismissal of the case in chief, and Judge Broderick dismissed Mr. Sapir's motion without prejudice at the same time. (Docket # 101)

For some years before coming to IBM, and during most of the time she was actively employed there, Dr. Misek-Falkoff was subject to severe recurring face and head pains for which there was no definitive diagnosis, although such was diligently pursued. These agonizing pains sometimes also affected her facial expression, and both the pain and physical manifestations could on occasion be disabling and cause her to be absent from the workplace. But, as contemporaneously witnessed and attested by co-plaintiff, she usually made up lost work time voluntarily after hours or on weekends (Motion, sealed Ex H), and during this period she was extremely productive as a teacher, researcher, programmer and system analyst, receiving very good performance evaluations (Answer Ex 23, 22, 20). She wrote widely-used practical computer systems, designed and administered innovative educational and computer training programs, developed an automated typesetting system for books, published numerous technical papers, and actively participated in professional conferences, herself conceiving and co-chairing in 1982 an international conference on software quality measurement, a subject area that has since become of great importance to the computing industry (Sur-reply Ex MF-11).

In early 1984 Dr. Misek-Falkoff was promoted to "staff systems analyst," a general job category spanning a very large set of particular assignments with varying degrees of required activities ranging from close interaction with the marketplace to intensive personal technical research (Answer Ex 1). One of her early particular assignments was to have "overall responsibility for the Office Systems Education program at the T. J. Watson Center." (Answer Ex 5) This category-initiating assignment was sometimes properly referred to as "Lead Office Educator."[7]

Also in 1984 Dr. Misek-Falkoff began to develop an active interest in applications of computers in the practice of Law, as a natural evolution of her earlier work in discourse analysis, and in January 1985, in conjunction with her IBM work and management approval, she applied for admission to the evening program of the Pace University Law School. As she wrote in her application, she hoped "to

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[7] The district court took issue with the plaintiff's use of the term "lead office educator" as differing from the employer's description of her job as simply "office educator." (Order p 4 Fn 5) It is clear from the exhibits cited here that it is the defendant employer who has misrepresented the situation.

combine my doctoral interest in verbal evidence, my computer work in text analysis and information retrieval, and the real world of practical exigencies comprising the practice of law" in such a way as to "remain an employee of IBM, and to find a place within that Company to combine my interests to my own benefit and that of my employer." ("Rationale for my applying to Pace University Law School," Sur-reply Ex MF-2)

In 1985, two watershed events occurred in the life and career of Dr. Misek-Falkoff.

First[8], on May 29th, another employee, one Neal Keller, a recent hire (3 months) with managerial aspirations and pretensions of being a psychologist (though not so credentialed), refused to continue a planned business meeting in which he was supposed to provide a demonstration and instruction on a standard personal computer application to Dr. Misek-Falkoff and another employee, one Elizabeth McCarthy. The record (deposition and trial testimony) shows that he was not fully prepared for the meeting and he tried to cover his embarrassment by verbally challenging them to an argument. When Dr. Misek-Falkoff said that she really wanted to get on with the business of the meeting, he taunted her with insults and statements to the effect that "as a psychologist" he knew her feelings better than she herself, and asked her to leave his office, which she did (Sur-reply Ex WW-23). The subject matter of the meeting, and even more, good working relationships, were important to Dr. Misek-Falkoff, and after twice returning to his office to try to get the meeting back on course, she expressed her frustration by bringing her hand down on a table[9] where a looseleaf notebook was resting open. Keller then picked up the notebook and left his office. That afternoon he reported several

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[8] The district court refers to what follows here in these terms: "An incident triggering events leading to this lawsuit occurred on May 29, 1985." (MO p6) And in a footnote attached to this statement, disclaims fault finding: "I make no findings as to who was at fault in this and any other incident set forth in this memorandum." (MO p6 Fn9) Accepting this at its face value, the incident itself can be removed from consideration as to the propensity of the plaintiff for "outbursts," an issue to which the district court attached decisive importance, and one to be discussed later in this brief. However, it remains necessary to deal with what was actually "triggered," to wit, a sequence of events violative of the plaintiff's civil rights.

[9] See below: The court errs in stating (Order p 6) that the table was next to Mr. Keller (not of record).

versions of what had transpired to multiple managers, and not getting immediate satisfaction from them he later that night wrote a memorandum (id.) in which he falsely accused her of trying to hit him over the head with the notebook, and threatened IBM with legal action over this alleged criminal assault. In the memorandum, sent on IBM's computer network the next morning, he wrote (Sur-reply Ex WW23) (underlines added):

> "I was assaulted physically on IBM property by an IBM employee."

And listed among the things he had "decided to do:"

> 1) Follow up to be sure that Linda gets the psychiatric counseling I feel she desperately needs. I need to know how IBM deals with these situations. As the person who was assaulted and who has to teach knowing Linda is still in the building I need some assurances that Linda is in ongoing therapy. This is not a matter of choice as far as I am concerned.
>
> 2) Press assault charges unless #1 above or some equally significant intervention strategy is implemented.
>
> . . .
>
> 4) Find out how we train all IBM managers to recognize and address personal stress in employees. I recognize that we have many gifted individuals at Research and that it is a rather unique and open environment but I sense that we (Research) were aware of problems and could have intervened before the crisis occurred.

He ended the letter with a self-protective flourish, suggestive of his psychological pretensions:

> "I would be willing to share this memo with Linda but felt at this time it might just add to the stress she is experiencing."

With evident malice, Keller sent this self-aggrandizing, defamatory, and extortionate letter to numerous people on IBM's computer network without any notice of confidentiality or sensitivity, where its further propogation could never be fully controlled, tracked, or retracted.

At the time (1985), various management people told Dr. Misek-Falkoff of the existence of the letter, told her different versions of the accusations it contained, and told her it could portend trouble -- and indeed very dire consequences -- in her employment, but she was not permitted to read the letter herself or hear actual quotes from it, and

no one told her that it contained threats of legal action by Keller against IBM. (Motion, sealed Ex P)

Keller maintained pressure on management, and on June 17th, after having had no further contact whatsoever with Dr. Misek-Falkoff since May 29th[10], he demanded that she be barred from attending a seminar he was giving in the auditorium. It fell to Ann Gruhn, Dr. Misek-Falkoff's manager, to go to her office at the last moment and ask her not to attend the seminar, even though Ms. Gruhn had earlier advised her to attend and had the understanding that she could. Under the circumstances, Ms. Gruhn was uncomfortable with the situation, and when Dr. Misek-Falkoff started to call the personnel department for clarification, as she had been instructed to do by the Medical Department, Gruhn attempted to take the phone away.[11]

IBM management's illicit campaign to discredit and dishonor Dr. Misek-Falkoff, using her handicapping medical problems as a central feature, started shortly afterward when Allan Weis, her departmental Director, who was in charge of the operation of the computer network, recognized the potential embarrassment that might result from Keller's misuse of the computer network (Sur-Reply Ex MF-2, Weis deposition 2/22/91, p 75)[12] and from manager Gruhn's improper impetuous reaction.

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[10] She was, in fact, out of the workplace most of that time, suffering from a then improperly diagnosed physical ailment which unhappily turned out to be the early stage of a miscarriage. (Medical Chart, 200395 200386) See NOTE below.

NOTE: The IBM Medical Chart for Dr. Misek-Falkoff was included as an appendix to the Kaminer Affidavit submitted by IBM in their original Motion. The pages are marked with production numbers from 200291 to 200614, but are otherwise not indexed. It will be cited in this brief in the form used immediately above.

[11] Keller had by now succeeded in creating enough of an uproar that the lines of authority to Dr. Misek-Falkoff had been become confusing; personnel officers, medical staff, and line management were all in the picture. When she asked the medical staff to help clarify matters that very morning, she was told to call the personnel department in case of need, and that is what she was doing when Ms. Gruhn tried to take the phone away (Motion Ex T). Ms. Gruhn admits reaching across Dr. Misek-Falkoff's desk for the phone after she started to make a call. (Motion Ex U)

[12] The potential embarrassment over poor network management was both corporate and personal, as Mr. Weis was even then being groomed to head a

The second watershed event was that through the coordinated efforts of her local physicians Dr. Misek-Falkoff was put in contact with one Dr. Peter Jannetta, a pioneering neurosurgeon at the Presbytarian Hospital in Pittsburgh, who finally diagnosed her prolonged and painful medical condition as "atypical trigeminal neuralgia," and performed delicate and dangerous brain-stem surgery to relieve the condition on August 1, 1985[13]. It has turned out that the operation substantially mitigated the condition, although the recuperative period was difficult. For a long time after the surgery she had considerable pain from the healing skull incision and sometimes wore a "TENS" wired-unit to electrically control the level of pain; she used a cane to help maintain her balance while walking, and she suffered from blurred speech and other post-operative problems. All these symptoms gradually diminished, and by the fall of 1986 she was reaping the benefits of the surgery, with substantially reduced pain from the neuralgia, and, as IBM admits, correspondingly fewer absences from the workplace (Motion Ex M)[14]. See also Sur-reply Exhibit 4, affidavits of Ross, Sayegh, Kelly.

Before her return from the surgery in mid-October, 1985, IBM management had already decided to exploit her medical condition and handicaps to put her out of the workplace. They concealed this plan from her, but when she returned to work and by invitation wrote to Dr. Ralph Gomory, Director of Research and IBM Executive Vice-

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company, Advanced Network Services (to be financed by IBM and others), to take over management and control of NSFNET, a major component of INTERNET. In this position, Mr. Weis is a public figure, and his management methods and principles have on occasion been criticized in the media.

[13] Although the district court took notice of the fact that the plaintiff had surgery "to alleviate the disorder" in 1985, two years before her severance from active employment (Order p 2), it nevertheless overlooks the fact that this was a turning point (toward a better life) that substantially mitigated the symptoms of her atypical trigeminal neuralgia and, significantly, incorrectly describes plaintiff's condition as obtaining, without differentiation, during the "last seven years of her employment" (Order p 4).

[14] The second secret application for MDIP (Motion Ex M) lists the employee's absence rate for 1984, 1985, and 1986 as 17.6, 43.0 and 16.7 percent respectively. Disregarding the absolute figures, which can be shown to be inflated, it is apparent that after the bump in absence rate in 1985 due primarily to the very serious brain stem surgery, her absence rate dropped below that of 1984.

president, about unfinished aspects of the incident with Keller, he insisted that she take part in an "Open Door" investigation. According to IBM Motion Ex Y), such an investigation is supposed to be objective, and the investigator is supposed to "view the situation from the perspective of the individual . . . ." In this case it turned out to be more like a kangaroo court. The report of the "Open Door" investigator[15] predictably whitewashed prior management actions and concluded that Keller's description of the events of May 29, 1985 was correct, without ever looking for evidence beyond the statement of an "eyewitness" who was legally blind in one eye (a critical factor of depth perception in this situation) and had been coached by a copy of the defamatory electronic mail -- thus paving the way to discharge Dr. Misek-Falkoff or secretly apply for total and permanent disability status for her, by claiming she had a propensity for violence. Meanwhile, IBM's managers and executives continued to deny her requests to access and respond to the accusatory letter, while using it for their own purposes, and they refused her requests to bring her together with Mr. Keller under management aegis with a view towards conciliation, so that the matter could be put behind them by both parties. IBM's managers finally encouraged her to bring a civil suit against Mr. Keller, thus cementing in a polarization between them, and as it turned out, also between the plaintiff-appellants and IBM, who without warning provided their own lawyers for Keller and ultimately declared themselves in privity with him.

Thus, IBM management, which had decided on a campaign to discredit Dr. Misek-Falkoff[16] as the most convenient way for them to solve the problems engendered by Mr. Keller's malevolence -- an irretrievable defamatory and threatening letter loose on their computer network and management indiscretions committed as sequelae to the Keller incident -- took advantage of the obvious medical handicaps of

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15 The district court erred in saying the investigation was done "for" the employer, it was in fact done "by" the employer.

16 See, for example, Motion Exhibit X, a memorandum apparently solicited by director Weis and written by manager Chandra on August 21, 1985. The employee had been away attending to her surgery for some four weeks, and the matters discussed in the memorandum had taken place three or four months before. Also, SUr-reply Exhibit AF-30, pages from deposition of Personnel Director Canavan, with reference to management pressure to terminate the employee.

the recuperative period when she returned to work following the surgery, and instead of celebrating the success of the procedure and welcoming back a productive employee who could now be expected to be an even stronger contributor to the IBM business, they began to isolate her and cut back her job, to set the stage for placing her on MDIP.

The activities engaged in by her direct management in collusion with members of the Medical and Personnel Departments[17] was such that their intentions could not be clearly discerned by the employee. However, she was moved on occasion to make inquiries about her status, and these were always answered with dissembling reassurances; in particular, she was encouraged to take more time before returning to the workplace in case of a medical absence. During this period, management actions such as a merit increase in pay and good peformance appraisals on the one hand, and cutbacks in her job and restrictions on her communications on the other, gave intermittent reinforcement to the thought that her employment status either was or was not in question -- conditions certain to confuse and worry anyone with or without handicaps, and certain to adversely affect work performance both directly, by deprivation of proper workplace facilities and tools, and indirectly, by its effect on the employee's health and morale. Nevertheless the record shows that Dr. Misek-Falkoff performed her job satisfactorily in spite of this adverse treatment.

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[17] The Medical Chart notes far more conferences with management and Personnel than interactions with the employee in the period from August 1985 onwards, and has large sections of "privileged matter redacted" in November and December of 1985.

ARGUMENT RE RES JUDICATA

Under The Applicable Statutes And Precedents Of New York State Law The Instant Action Is Not Precluded By Any Other Legal Action Involving The Plaintiff-appellants

Plaintiff-appellants appeal the lower court's dismissal of the federal claim in this action as barred by res judicata, which the court based on the state court action, Misek-Falkoff and Falkoff v. International Business Machines Corporation and Allan H. Weis, Index No. 7720/88, New York Supreme Court, Westchester County (1988, Gurahian, J.) (the Weis case) and the application of New York Law. The question is whether the application to the facts in this case was properly carried out.

Plaintiff-appellants assert that the court erred in the application of New York's "pragmatic transactional analysis" principle by failing to examine facts in context (totality of circumstances), and by failing to apply all the criteria for distinguishing the gravamina of the two cases, since such examination would have shown them to be different, and that therefore claim preclusion and res judicata could not apply; that the two cases were largely concurrent, and had they in fact been brought in the same court at the same time on the different claims of intentional infliction of emotional distress and of violation of the Rehabilitation Act, each claim would perforce have survived or fallen independently because of the different gravamina; that the claims which "could have been brought" were indeed brought in separate contemporaneous actions, as permitted under New York law; and that in any case, the dismissal of the Weis case was not "on the merits," so claim preclusion could not apply for that reason. Furthermore, the lower court erred in not considering the evidence that the decision in Weis was tainted by deliberate deception on a material issue, which should have been a threshhold question in considering whether to give it prospective weight.

Finally, we raise here the consideration that the defendant could have brought on a motion for dismissal on the basis of the res judicata defense with identical facts and arguments at least two years earlier than they did, and they should not now be allowed to sweep into the waste basket the factual evidence and judicial rulings that were

obtained at great cost while preclusion was statically lurking in the background.

The matter of res judicata deserves a very high level of review inasmuch as it is a drastic remedy which carries with it the danger that a litigant will be unfairly deprived of a day in court.

New York's principle of "pragmatic transactional analysis" when properly applied in the instant situation leads to the conclusion that res judicata is not appropriate because the gravamina of the two complaints are different.

The district court's reliance on Smith v. Russel Sage College, 54 NY2d 185, 445 NYS2d 68, 71,429 NE2d 746 (1981) is misplaced. The Memorandum Order quotes extensively from that case, especially where it quotes from Matter of Reilly v. Reid, 45 NY2d 24, 407 NYS2d 645, 648, 379 NE2d 172 (1978). The court notes similarities in some of the factual allegations in the complaints of the Weis case and the instant case, and fails to look further than that part of the cited authorities which can support preclusion on the basis of such superficial similarities. Thus, the Memorandum Order improperly takes for granted the predicate that the two cases must be grounded on the same gravamen and states as follows (Order p 17):

> A cause of action which cannot be revived once dismissed "may denote one of several separately stated claims in a pleading based on the same congeries of facts but related to different legal theories of recovery. A 'cause of action' may also denote a separately stated claim on the same congeries of facts, but for different legal relief. But even if there are variations in the facts alleged, or different relief is sought, the separately stated 'causes of action' may nevertheless be grounded on the same gravamen of the wrong upon which the actions is brought." Smith, 445 N.Y.S.2d at 71, quoting Matter of Reilly v. Reid, 45 N.Y.2d 24, 407 N.Y.S.2d 645, 648, 379 N.E.2d 172 (1978). [Underline added.]

In following this course of predetermination and not considering the "may not" side, the court simply rides over the real difficulty in determining whether the gravamina are the same, a point on which Reilly has a good deal to say:

> It is blackletter law that a valid final judgment bars future actions between the same parties on the "same cause of action" (see, e.g., 50 CJS, Judgments, § 598). The difficulty arises in determining when a second action involves the same cause of action as an earlier one (Perry v Dickerson, 85 NY 345, 348). Many definitional verbalizations have been attempted, none with complete success. For instance, in Secor v Sturgis (16 NY 548, 558) it was said that "[the] true distinction between demands or rights of action which are single [**175] and entire, and those which are several and distinct is, that the [*28] former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts."

In the present instance, rights of action are "several and distinct," since the claims in the Weis case arise out of the overt acts of the defendants, and the claims in the instant federal case arise from their covert acts. That the overt acts may have been in the service of the covert acts, or arisen from them is immaterial.

Reilly further emphasizes this point of the difficulty of determining what is the same cause of action, and its central importance to properly implementing the policy bases for res judicata:

> The nub of the problem is that the policy bases for res judicata, in the sense of claim preclusion, do not permit easy definition of the "same cause of action", a term which, as will be seen, is not one of single meaning in the practice.

Significantly, later in the opinion Reilly gives a relatively objective criterion for determining when a second action may not be barred:

> It is true that even when two successive actions arise out of the identical course of dealing, the second may not be barred, it has been said, if "[the] requisite elements of proof and hence the evidence necessary to sustain recovery vary materially" (Smith v Kirkpatrick, 305 NY 66, 72, supra).

To apply this criterion to the instant case, we can find the requisite elements of the proof spelled out by the lower court (Order p 23):

> To establish a prima facie case under Section 504 of the Act, 29 USC 794, plaintiff must show that at the time of placement on permanent disability she was (1) handicapped within the meaning of the Act, (2) "otherwise qualified" to perform the essential functions of her given position, (3) placed on inactive status solely by reason of her handicaps,

and (4) that the employer was a recipient of federal financial assistance.

It is painfully obvious that not a single one of these requirements for proving violation of the Rehabilitation Act is a requirement for proving intentional infliction of emotional distress; and conversely, the requirement for proof of the latter -- that the acts complained of outrage the sensibilities of reasonable members of society -- is not required to prove a violation of the Rehabilitation Act.

Proper application of transactional analysis, as above, shows conclusively that the transactions in the two cases cannot be the same because the claims in Weis arose from transactions between the plaintiff and members of IBM's management, while the matters complained of in the case at bar arose from transactions among the members of management themselves (see O'Brien v City of Syracuse).

The plaintiff-appellants exercised their due process right to choose the appropriate forums for different actions, and to pursue them separately and concurrently, and should not be penalized for so doing

The Weis case, with a cause of action of intentional infliction of emotional distress, was brought on May 13, 1988. One month before, on April 14, 1988, plaintiff-appellants retained an attorney specializing in employment matters to evaluate the justness of bringing an action for discrimination on the basis of disability. On or about June 8, 1988, said attorney wrote to IBM to inquire about federal funding, as a preliminary to a possible action under federal law[18]. Thus, although the instant case was not filed until later, plaintiff-appellants were committed to the federal action for

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[18] Although the actual timing may be irrelevant in light of other considerations which militate against res judicata, this point is noted here because the Memorandum Order gratuitously calls into question the good faith of the plaintiff-appellants by the here unjustified remark that "To permit plaintiff to proceed with this action would defeat the purposes of claim preclusion. It would permit a disappointed litigant to resort to federal court to trump the state judicial system where the litigant chose to bring the initial litigation and fully exercised the opportunity to litigate the case." (Order p 19) It is clear from the chronology that there could have been no thought of "trumping" the state courts.

discrimination and IBM had notice of their intention long before April 29, 1989, when the state motion court ruled on the Weis case.

The complaint in the instant case was first filed on July 10, 1989, naming IBM and several executives as defendants, but because plaintiffs could only estimate the true cast of characters it was withdrawn and refiled on attorney advice naming only IBM on September 22, 1989 (Order p 13, Fn25). Thus, there was at least 8 months before the Appellate Division confirmed the dismissal of the Weis case, and 12 months to the "final" disposition by the New York Court of Appeals, during which the two cases ran concurrently. As can be seen by examination of the docket, throughout this period of concurrency, and before, IBM made no effort to merge or combine the cases for court economy, convenience of parties, logical considerations, or other reasons.

Plaintiffs' right to separate actions is spelled out by the New York Court of Appeals in the Matter of Reilly v. Reid, as noted above, a case cited in Smith v. Russell Sage College, which in turn is actively relied upon by the defendant and the lower court:

> These strong policy bases [i.e., judicial economy and the need at some point to end litigation], however, if applied too rigidly, could work considerable injustice. In properly seeking to deny a litigant two "days in court", courts must be careful not to deprive him of one (cf. Commissioners of State Ins. Fund v Low, 3 NY2d 590, 595). Thus, claim preclusion is tempered by recognition that two or more different and distinct claims or causes of action may often arise out of a course of dealing between the same parties, even though it is not, except in refined legal analysis, easy to say that a different gravamen is factually involved (see, e.g., Smith v Kirkpatrick, 305 NY 66). A party's choice to litigate two such claims or causes of action separately does not bar his assertion of the second claim or cause of action (see Secor v Sturgis, 16 NY 548, 554, supra). [Underlines added].

Hence, the point that "[n]ot only could plaintiff here have raised all of her claims in state court; she also had the choice of proceeding initially in federal court," (MO p19) is improperly applied here to the issue of res judicata because two different and distinct causes of action did arise out a course of dealing between the same parties.

The Weis case, was not "fully litigated," independent of the fact that its gravamen differed from the instant case

__In a landmark case overturning earlier standards, the New York Court of Appeals gave a list of nine criteria to be applied in deciding whether a party has had one's day in court:

> A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation. (Schwartz v Public Administrator, 24 NY2d 65, 298 NYS2d 955, 246 NE2d 725 (1969)) [Underlines added]

__The forum of the Weis case was the same New York Supreme Court which had earlier dismissed by summary judgment Dr. Misek-Falkoff's defamation case against Keller, only to have the dismissal overruled and the case remanded by the Appellate Division[19]. The ruling of the Appellate Division was not yet available at the time that the Weis case was filed, and IBM's attorneys, who were also Keller's (courtesy of IBM), maneuvered to have the same judge (Gurahian) assigned in both cases.

__The extent of the litigation was pitifully slight. The state motion court[20] decided the Weis case on the papers only. There was no discovery, and therefore the factual issues could not be and were not fully litigated. This was reflected in the decision of the Appellate Division which stated, in part:

> Absent concrete factual allegations of a continuing conspiracy or concerted course of action against plaintiff, we need not

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[19] The Appellate Division found genuine issues of triable fact and the need to test defendant's affiant.

[20] It is possible that the district court was unduly influenced by defendant-respondent's repeated reference to a phantom "trial court" in talking about the Weis case. In fact, the case was disposed of on the papers in the Individual Assignment (Pre-trial) Part of the New York Supreme Court in Westchester County, and never came close to the Trial Assignment Part, much less to a trial.

reach the issue of whether, if properly pleaded, the acts more remote in time could be considered actionable as part of a "continuing" tort.

There could be no more consideration without discovery; but discovery in the instant case did adduce substantial evidence of "concerted action against plaintiff," which must be examined here as to whether it was (and is) in violation of the statutes[21]. Inasmuch as no judicial time or effort was expended on these matters heretofore, the principle of judicial economy would not be compromised by such examination.

There was no opportunity to find new evidence between the filing of the Weis case and the filing of the instant case. In the minds and intent of the plaintiffs these were contemporaneous actions, there was no discovery whatsoever in Weis, and, of course, IBM did not volunteer any information.

There was some indication of a compromise verdict, precisely in a direction to forestall preclusion and leave open the possibility of later actions. The motion court chose to dismiss on the basis of CPLR 3211(a)(5) and (7), rather than on CPLR 3212, summary judgement (see below), and the Appellate court left open the possibility of further litigation if concrete facts were ever to come to light (see above).

There are stark differences in the applicable law, as shown above; e.g., the necessary proofs are completely disjoint.

The Weis case was not decided "on the merits" so as to be preclusive, in any event

The case of Smith v. Russell Sage is cited by defendant as a precedent for bar on action in the federal court because in that case (and others cited) procedural dismissal was treated as if on the merits. In Smith, however, and as pointed out by Siegel in his New York Practice, and the CPLR, that treatment was contemporaneous; conversion of 3211 dismissals to 3212 merits decisions must in New York State be by explicit conversion, by motion of defendant or if sua sponte documented expressly in the Order or Decision, else all dismissals on technical grounds could belatedly and wishfully be treated as on the merits and 3212 need not exist in the law.

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[21] An earlier opinion in the instant case is suggestive on this point (144 FRD 48 (SDNY 1992) Fn 1), raising the question of possible planning for a future wrong.

In their Notice of Motion in the Weis case, the defendants therein moved for:

> . . . an order pursuant to C.P.L.R. 3211(a)(5) and (7), or alternatively, for summary judgment pursuant to C.P.L.R. 3212, . . .[Underline supplied]

IBM's Reply Memorandum of 3/5/93 states without foundation that they asked for:

> . . . both a motion to dismiss pursuant to §3211(a)(5) (statute of limitations) and (7) (failure to state a cause of action) and a motion for summary judgment pursuant to CPLR §3212. [Underline in original]

It is not clear why the defendant introduces this discrepancy, but either way the possibility of a §3212 judgment was before the motion court, and it chose to grant only the §3211 dismissal, not on the merits. The decision (Motion Ex A) is unequivocal on this point:

> Defendants move to dismiss on the grounds, inter alia, that the timely allegations of the complaint fail to state a cause of action (CPLR 3211[a][5] and [7]). (Exhibit p 1)
>
> . . .
>
> In view of this court's finding on the grounds of CPLR 3211[a][5] and [7], dismissing the complaint . . .. (Exhibit p 5)

Nowhere in the decision is §3212 mentioned, and the requisite explicit contemporary conversion to "on the merits" is absent.

The decision in the Weis case was tainted by false representations and therefore it should not have prospective weight.

The district court erred in failing to address the evidentiary materials offered by the plaintiffs showing that the defendant IBM deliberately misled the Weis court on the material issue of the nature of the placement of plaintiff Dr. Misek-Falkoff on MDIP, thereby irrevocably tainting the decision. At this time we cannot know how the motion court would have ruled[22], -- or, if it had ruled the same way,

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22 The district court is mistaken in supposing, as stated in its footnote 29, that plaintiffs applied to the state court for relief from the dismissal of the Weis case (also mischaracterized there as an "employment action"). They did ask the state court to reconsider, in the light of the discovered fraud, an Order of April 1, 1988, in the Keller case, and grant the plaintiffs' previous application to file a Second

how the Appellate Division would have ruled -- had the courts known that the placement on MDIP was permanent, with no prospect of plaintiff ever being restored to active employment at IBM, as was adduced by discovery in this federal action. The decision of the Weis court that placement on MDIP was not sufficiently egregious to shock the conscience of the community was necessarily (and erringly) based squarely on sworn averments of IBM's attorney (Affidavit of Eugene Souther, sworn to September 14, 1988, in support of defendant's motion to dismiss or for summary judgment in the Weis case):

> . . . placing Misek-Falkoff on the company's Medical Disability Income Plan ("MDIP") "does not amount to either termination of employment or from preclusion of return to active employment at full salary" (Sur-reply Ex WW-26, affidavit of E. Souther)

The truth of the matter, necessarily known to the defendant and its attorneys, but not to the court or the plaintiffs, is that IBM in secret fact regarded the MDIP as a form of permanent temination. The key is given in the letter approving the MDIP application in which this paragraph appears (Answer Ex 16):

A medical review is not requested. [Underline added]

Since a medical review is required in order for a person to return to active employment, the significance of this paragraph, as we learned only recently, is that they will never have a chance for return. That this was the intent in the case of the plaintiff is confirmed by the deposition testimony of the then Manager of Personnel for the IBM Research Division (Answer Ex 3, Sur-reply Ex 15):

> Q. Did the panel state whether or not the benefits that were granted were mandatory or voluntary?
>
> A. Mandatory.
>
> Q. The panel said that?
>
> A. Yes.
>
> Q. Was the request for mandatory benefits made by Dr. Kaminer?

Amended Complaint and restore the first and second causes of action, the only two of twelve causes of action which the Appellate Division had not restored upon remand. Had they asked for relief in Weis, the basis in newly discovered fraud would have been essentially the same, but here it would have concerned the whole case rather than a relatively small part of it as in Keller, and it is impossible to predict what the outcome would have been.

A. Yes.

Q. And had you and Dr. Kaminer discussed whether or not the request would be mandatory or voluntary?

A. I believe we discussed it.

Q. And can you tell me what you recall about that discussion?

A. I know we discussed it and believed it would be mandatory. We would request mandatory MDIP.

Q. Were you in favor of mandatory benefits?

A. Yes, I was.

Q. What was the reason or reasons that you were in favor of mandatory benefits?

A. The reason I was in favor of mandatory benefits was that I felt it was inappropriate for Dr. Misek-Falkoff to come back into the IBM work environment.

Q. Did you think it was inappropriate for Dr. Misek-Falkoff to have a choice in deciding whether to accept or reject the benefits?

A. I didn't believe she should have a choice; no.

Q. And was the reason you didn't believe she should have a choice because you felt that she should not be permitted back in the work place?

A. Yes, that's what I said.

Q. Did you feel that Dr. Misek-Falkoff should ever be permitted back into the work place?

A. I did not feel she should ever be permitted back in the work place. [Underlines added]

It is clear from the foregoing that IBM did indeed mislead the Weis court on a material matter, that this deception was before the district court, which erred in not addressing the estoppel effect such fraud should have on preclusion, in particular nulling prospective applications of a judgment without necessarily overturning the judgment itself in the light of Federal Rule 60(b) or NY CPLR 5015.

Thus, even if Weis had been decided on the merits, or so converted by motion, which it was not, affirmative relief in the form of res judicata on the matter decided (an equitable remedy requiring clean hands) should not be available for a defendant who has surreptitiously

withheld highly material information from the plaintiff and the courts.[23]

Because of the history of this case, the same principles of judicial economy and the need at some point to end litigation, which underlie New York law on res judicata, perforce rule out the use of the res judicata defense at this time in this action

With regard to the application of New York law on res judicata to the facts of this case, the argument above provides a sufficient basis to warrant a finding for the plaintiff-appellants if the district court were to have viewed it in the light most favorable to the non-movant. The fact that it did not take this view is clearly an error. Moreover, there is still another compelling reason for reversal, having to do with the timing of the motion for dismissal.

The argument advanced by IBM for res judicata is based entirely on the similarity between certain subsections of the two complaints, and this similarity was known to the defendant from the start. The so-called final adjudication of the Weis case took place on September 18, 1990, when the NY Court of Appeals denied leave to appeal. Defendant-respondent's motion for dismissal on the grounds of res judicata, brought on September 30, 1992, and again in a modified motion on March 5, 1993, depends on nothing that transpired after September 1990, and depends on no facts not known then. If judicial economy and putting an end to litigation were its justification, it should have been brought sooner rather than later, and could have been brought with the same effect at any time after September 1990.

Since then, the district court has published two opinions, and the litigants have been burdened with 6000 produced documents and 23 depositions, tremendous expenses in money and time, not to say emotional costs in dealing with some of the more odious aspects of IBM's illicit covert actions learned about in the course of two years of discovery.

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[23] If the Weis decision was not obtained by fraud (i.e., Dr. Misek-Falkoff is really not precluded from return to the workplace), then since the plaintiff is still an employee of IBM, albeit an "inactive" one, it must be asked if the fact that the employer has taken no action to determine if she should be reinstated is currently and continuingly an instance of adverse discrimination and a violation of the Rehabilitation Act.

If the district court's erroneous ruling for res judicata is affirmed it will cement in judicial waste, rather than advance judicial economy, and while it may bring an end to the litigation, it will have done it after exacting huge costs which, according to this (erroneous) ruling, were really unnecessary. To put it differently, if it were proper to end this litigation by res judicata, it should have been done before the costs were incurred and so much time was lost.

> The defense of res judicata can be waived if it is not raised in a proper and timely manner, and if the defendant in the second action behaves in a manner inconsistent with a claim of res judicata.[24] (Weinstein Korn and Miller, New York Civil Practice, vol 5, p 50-123 (1994))

It is now too late to invoke this affirmative defense with any equity. Therefore, the res judicata ruling should be reversed in the interest of justice (FRCP Rule 1), and in accord with the application of the very same underlying principles of jurisprudence that govern its use under New York Law.

ARGUMENT RE SUMMARY JUDGMENT

Plaintiff-appellants appeal the granting of summary judgment as being unsupported by the facts and the law[25].

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[24] Two years of discovery proceedings, including highly intrusive depositions of the plaintiff's private physicians insisted upon by the defendant, is certainly inconsistent with a claim of res judicata. IBM's notice of a Modified Motion (in lieu of a Reply) on March 5, 1993, in which they dropped the request for summary judgment, restricting themselves to res judicata, strongly suggests that they may have been aware of the impropriety of their course of action and the consequent waiver of the res judicata defense. The length and complexity of the events as recorded in the docket speaks also to the untimeliness of defendant's res judicata motion

[25] The material here is fact intensive, but subject to selection and interpretation. The law, as given for example, in Overton v Reilly 977 F.2d 1190 (7th Cir. 1992), which summary judgment granted at the district level was reversed because "Overton has presented evidence sufficient to create a genuine question whether he was qualified for his position," the court wrote of its own duty thus:

> We review a grant of summary judgment de novo, and must take the facts in the light most favorable to the non-movant.

Plaintiff-appellants raised genuine issues of material fact relating to precisely those issues on which the lower court found for the defendant, and made the requisite prima facie case to defeat the motion for summary judgement. The factual evidence shows: that Dr. Misek-Falkoff was "otherwise qualified" for her job as shown by formal evaluations and other incontrovertible evidence; that the prominent role of medical records and testimony of IBM's managers and medical department lead to the obvious incontrovertible conclusion that the adverse treatment of Dr. Misek-Falkoff was "solely on the basis of her handicap" as a matter of law; that IBM acted purposefully and in violation of the Rehabilitation Act in secretly planning to remove her from the workplace; that pending the maturation of their plan, IBM not only did not accommodate the plaintiff's handicaps or perceived handicaps, but actually disaccommodated -- moving her to a workplace site that did not have a medical facility, segregating her from her departmental coworkers (but not at all from other employees), and virtually cutting off her access to the tools (appropriate computers and printers) necessary for her assigned task; and that IBM violated the Rehabilitation Act and their own rules and procedures when they placed the plaintiff on Medical Disability without offering her the standard option of resigning.

The facial cause of action in this case subsumes and does not highlight gender or age discrimination, because discrimination against the handicapped of any age or gender is deplorable. But that these are subtexts echoes throughout the opinion. There is still a tendency to

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This appeals court, in Teahan v. Metro-North 951 F.2d 511 (2nd Cir 1991) also reversed and remanded a finding of summary judgment, in the course of which it cogently stated the aims of the Rehabilitation Act and the consequent obligations on the employer and the courts:

> For an employer to assume that simply because of a handicap an individual is unable to function in a given employment context stereotypes that person, seeing him, as it were, through a glass, darkly. To view a handicapped person in such a simplistic way effects the discrimination forbidden by § 504. At the same time nothing in the statute prevents an employer from making a decision based on the job-related attributes of a person's handicap. It is the close interplay of these two notions, that is, between a handicap and its attributes, that we must analyze and resolve on this appeal.

regard women and men differently in the workplace, even among well-meaning people. One such bias is the idea that paid work or a professional career is not as important to a woman as to a man, and therefore her right to a place in the work force is not as strong. This perhaps unconscious bias may influence decisions both in, and about, the workplace. But women's professions are now accepted as being as important in our society as men's, and issues surrounding women's professions are clearly deserving of more than a cursory glance. Hence, a high level of review should be applied to the matter of summary judgment herein.

A Prima Facie Case Has Been Made, And Genuine Issues For Trial Have Been Adduced, When Ambiguities Are Resolved And Reasonable Inferences Appropriately Drawn In Favor Of The Non-moving Party

In ruling on summary judgment, the District Court stated the requirements on the plaintiffs to be as follows:

> To establish a prima facie case under Section 504 of the Act, 29 USC 794, plaintiff must show that at the time of placement on permanent disability she was (1) handicapped within the meaning of the Act, (2) "otherwise qualified" to perform the essential functions of her given position, (3) placed on inactive status solely by reason of her handicaps, and (4) that the employer was a recipient of federal financial assistance.

The District Court assumed (1), that plaintiff was handicapped "for purposes of ruling on this motion" (Order pp 23,24), and noted that the defendant does not challenge (4), that the employer received federal financial assistance (Order p23 Fn 33). The court did not independently address (3), whether IBM's actions were solely by reason of plaintiff's handicaps, but concentrated on (2), the question of "otherwise qualified."

(1) At all times before and at the time of her processing onto permanent disability status, and currently, plaintiff Dr. Misek-Falkoff was and is handicapped within the meaning of the Rehabilitation Act

The Rehabilitation Act, as quoted in the Memorandum Order, defines a "handicapped" person as one "who (i) has a physical or mental impairment that substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 USC 706(7)(11). Defendant perforce conceded that Dr. Misek-Falkoff was handicapped within the meaning of the Act by placing her on the Medical Disability Income Plan (MDIP) for which the eligibility requirement is described thus in "About Your Company," the IBM employee handbook:

> An employee will be considered medically disabled by giving satisfactory proof[26] to IBM that a disability from any cause prevents the taking of any employment for pay or profit. (Motion, Ex LL)

Work qualifies as a major life activity, as aptly observed by the District Court (Order p23), so anyone properly placed on this plan is at least regarded as having an impairment that limits the major life activity of work, and is therefore handicapped within the meaning of the Rehabilitation Act.

Similarly, an employee "on whose behalf" management applies for medical disability benefits is at least perceived as having such an impairment and is therefore necessarily handicapped under the Rehabilitation Act (unless, of course, management is dissembling and the application is being made fraudulently, which would be a violation per se of §504). As admitted by the defendant (Motion, Kaminer Aff, ¶4):

> The MDIP process is initiated by or through the employee's management when the employee's absences, behavior or performance demonstrate that the employee is unable to sustain consistent job performance as a result of his or her medical conditions. (underline added)

Such a process with respect to the plaintiff was secretly initiated on January 21, 1986 (Motion Ex EE), and again on April 8, 1987 (Motion Ex M), from which it is necessary to conclude that the

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26 The record before the court shows that Dr. Misek-Falkoff did not apply for placement on MDIP, did not know that she was being considered for it, and therefore, of course, did not provide any "proof". As amply documented throughout the papers in this case, all the MDIP processing was conducted in secret. (See, e.g., Answer, Aff of plaintiff, ¶¶4,25,26.)

plaintiff was regarded as handicapped by her managers and other IBM officials at least as early as January 1986, and at least as late as June and July 1987, when the April 1987 application was approved and acted upon. It is reasonable to assume that she was regarded as handicapped in between as well, and also -- since she is still an employee (inactive) and has not been restored to active status -- that she is still so regarded.

Thus, the plaintiff was handicapped within the meaning of the Rehabilitation Act at all times relevant to this action, and the District Court's assumption that she was handicapped "[f]or purposes of ruling on this motion" is reasonable.

(2) Plaintiff was otherwise qualified for her job at all times of her processing onto permanent disability, (and at all other times during her active employment as well)

As a prelude to considering the question of whether the employtee was "otherwise qualified" for her job, the District Court stated its version of the issues in the following prejudicial formulation (Order p 22):

> Does prohibited discrimination arise where a handicapped employee, qualified to perform the technical functions of her job but unable to get along with coworkers and management or to perform effectively in a timely manner, is placed on mandatory inactive status? (Order p 22). (Underline of conjectural part added)

This is a heavily loaded "question," and it will be shown that in order to justify the predicate (which carries an implication of "not otherwise qualified") the court necessarily erred in its assessment of the evidence before it, including the nature of plaintiff's job at the time in question.

The District Court went on to give its analysis in the following terms, harking back to conditions as they may have been in early or mid-1985 (Order p 25) (underline added):

> Whether or not plaintiff was "otherwise qualified" to perform the essential functions of the job turns on the significance of absences and interpersonal relations, factors the employer cites as the basis for decline in plaintiff's ability to perform, and as the reasons for her ultimate removal from active

employment, in light of the employer's official job description for a staff systems analyst and office educator.

But in late 1985 and continuing until the placement on forced disability status in mid-1987, plaintiff's job was severely narrowed to the point where her assigned tasks did not match the description of her former staff systems analyst job, and she was no longer an office educator[27]. Consequently the significance of absences and interpersonal relations was much less, and the District Court necessarily errs in accepting as a standard the employer's false depiction of the requirements at the time in question. Countervailing facts were before the Court, in the form of performance plan job descriptions (compare Answer Ex 21, Performance Plan of 1/28/86[28], and Answer Ex 20, Performance Plan of 1/11/84[29]), item

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[27] The change in assignment was punitive, and not by reason of any failure in performance, which was more than satisfactory in every aspect of her job. See footnotes below.

[28] The principle assignment after 1985 reads thus:

> Install TEX on Yorktown VM systems. Ensure that the installation is complete and verify that TEX works.
> Determine what printers are supported and what fonts and in what sizes are available for which printers.
> Understand and document existing procedures to use TEX.

Compare this with the last previous assignment described in the following footnote.

[29] The principle assignment prior to mid-1985 reads thus:

> Linda's main assignment is to establish a program to ensure that our users take advantage of the tools we have provided to improve productivity in the office. Her responsibilities include the following:
> * establish education programs to reach users who don't come to the RePEP sessions and who are using obsolete methods (e.g. executive secretaries, managers)
> * develop user documentation and teaching aids
> * investigate alternative approaches to self-education (e.g. combination of slides and taped monologues, videotape, online interactive sessions, learning center)
> * provide a program for new user education designed especially for secretaries, and asist in administering the program as needed.

14(e) of Plaintiff's Amended 3(g) Statement, Dr. Misek-Falkoff's sworn statement (Answer, Aff. ¶25), and Mr. Falkoff's sworn statement (Sur-reply, Aff. p7 ¶10[30]).

Indeed, the lower court noted that the employee's job was changed: "Plaintiff claims that the employer . . . removed her from her position as a computer analyst and office educator" (Order, p2); ". . . she was later moved to another facility, and her job assignment was modified." (Order p7); and a quotation, "'[He] [i.e., her manager] made more cuts in her job at that point.'"

Nonetheless, defendant begs the question of the job requirements at the time of the MDIP by talking about the job requirements of the staff systems analyst and office educator assignments, without saying that they obtained pre-1986, and not at the relevant time (Answer, Weis Aff ¶16; Garley Aff ¶11 et seq). Defendant also introduces into the record some pages from Dr. Misek-Falkoff's deposition testimony about her work when she was working as a staff systems analyst and

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> Evaluation criteria include the quality of the program Linda defines, her ability to manage its implementation, and the completeness and effectiveness of documents she writes and presentations she puts together.

It is noteworthy that the execution of this assignment, the last as a staff systems analyst and office educator, and one indeed requiring sensitive interaction with others and timely results, was rated "CONSISTENTLY EXCEEDED the requirements of the job IN ALL KEY AREAS." (Emphaisis in original)

[30] Sur-reply, Falkoff Aff., p7, clearly affirms that plaintiff's job was different, and points out where defendant's affidavit's deliberately confuse the chronology and are in error:

> . . . Weis (in ¶16) and Garley in ¶¶11-15, talk about Dr. Misek-Falkoff's job responsibilities in 1984-1985, as if they were the same in 1986-1987. She was still rated a Staff Systems Analyst until her MDIP termination, but there is ample testimony which need not be repeated here that her job, once she returned from brain-stem surgery and was being held in disfavor on account of the Keller defamation, was reduced to that of a programmer (not a dishonorable profession by any means, but not Dr. Misek-Falkoff's forte) with minimal requirements to personally interact with people. In fact, her management chose to isolate her from her group and steadily reduce her contacts both within the Research Division and outside it, so that she would not be missed by many people when they eventually let the axe fall.

office educator, that is, when she was designing systems and software[31]. Thus, the Court errs in accepting the defendant's description of the requirements of the employee's job in the period addressed by this action, and also when citing the "plaintiff's own definition of her duties at deposition" (Order p26) as the basis for judging whether she was "otherwise qualified" at the relevant time.

The formal written appraisals of the plaintiff's performance, conducted by the employer as a normal business practice, unequivocally show that she more than satisfied the requirements of her jobs (Answer, Ex 20 21 22 23; Order p5 Fn7). These appraisals were made by seasoned managers "trained in the evaluation process," and were monitored for quality by the Personnel Department (Answer Ex 6, Bergren deposition pp285 286). The written evaluations are intended by IBM to be definitive about all aspects of performance:

> The purpose of the Performance Planning, Counseling and Evaluation Program is to let employees know what is expected of them, how they are doing, and how they may improve their performance. It also provides a means of evaluating an individual's overall performance as a primary consideration for salary purposes. (Answer Ex 7, pages from IBM Manager's Manual[32])) (Underlines added)

An overall level of performance necessarily takes into account the effect of absence from the workplace, and the fact that attendance may be independently considered a "condition of employment" is orthogonal to this.

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31 The deposition extract (Reply, Ex J) starts at a point that tends to obscure the fact that the plaintiff's description of her work relates to a type of assignment she no longer had after 1985. Nevertheless, if one recognizes that she was not expected to plan "conceptual systems" or "design software" in her final assignment, the true nature of the questioning is revealed (underline added):

> A. . . . I was part of the initial planning of these systems, meaning the conceptual system.
>
> Q. I will ask you in a few minutes about some examples of the software that you helped design, but at the moment I am just asking the physical steps, the functional steps of what you did to design software.

32 Also see Answer Ex 26, page from "About Your Company," handbook for employees.

As the district court says, "[w]hat is most significant, however, is not absences as such, but whether or not the job is completed in a timely manner in light of the work involved." (Order p 26) This being the case, a level of absence that slows the completion of a job will perforce have an effect on the measured performance, and conversely, a satisfactory or better performance evaluation implies that absence was not excessive in a practical sense.

Similarly, if good skills in interpersonal relations are a functional requirement for a job, as they were for the plaintiff when she was working as a staff systems analyst and office educator, then a satisfactory appraisal (in this case a "2": "CONSISTENTLY EXCEEDED the requirements of the job IN ALL KEY AREAS." (Answer Ex 20, Performance evaluation of 9/11/84)) implies that the interpersonal relations were good.

Plaintiff's appraisal on December 1, 1986, the last before she was placed on MDIP, was reviewed and approved by Allan H. Weis, an executive level manager. She was rated "3": "Results achieved consistently met the requirements of the job and exceeded the requirements in many areas." (Answer Ex 21) It follows that her absences were not excessive and her interpersonal relations were at least adequate for the job, and she was therefore "otherwise qualified" for her job at that time, the same job she had at the time of her placement on MDIP.

Nevertheless, despite the court's analysis that "[w]hether or not plaintiff was 'otherwise qualified' to perform the essential functions of the job turns on the significance of absences and interpersonal relations," (supra) and the official performance evaluations indicating that these factors did not interfere with good performance, the lower court erroneously found that the plaintiff was not "otherwise qualified."

The actual finding of the District Court is obliquely stated as the premise of the question quoted above, namely that the plaintiff was "unable to get along with coworkers and management or to perform effectively in a timely manner." This finding is not supported by the referenced record when ambiguities are resolved in favor of the non-movant as they should be. At the very least, plaintiff-appellants provided substantial evidence showing that in these matters there were genuine issues for trial.

The evidence most relied on by the district court is self-servingly contrived by defendant employer-management to exploit the employee's handicaps for their own purposes

__To arrive at its questionable conclusions, the court relies chiefly on four of defendant-respondent's (sealed) exhibits, but the provenance of these uniformly self-serving documents raises serious questions about the reliability of their contents, and to the extent that they would be admissible as evidence -- if at all -- it would be a matter for a jury to decide how much weight to give them, and to what purpose. As is shown below, one document (Motion Ex I) does not reach to the time period this action pertains to, and comprises secret notations elsewhee contradicted; another (Motion Ex O) is a report, written more than three months after the last date it concerns, in which the covering memorandum, quoted by the court, contradicts its own internal conclusions; another (Motion Ex P) is the report of a kangaroo-court like investigation (nominally, an "Open Door") forced upon the plaintiff immediately after her return from brain stem neurosurgery; and the fourth (Motion Ex G) is a completely contrived effort at managerial post-justification and cover up, comprising hearsay and solicited gossip.

Re Defendant's Motion Exhibit P, "Canavan Open Door Report." Plaintiff's managers decided in the summer of 1985 that they wanted to remove her from the workplace. (Sur-reply EX AF30, portion of Canavan deposition) As early as October 11, 1985, before Dr. Misek-Falkoff returned to work following brain-stem surgery, preparations were being made to oust her via medical disability (Sur-reply Ex WW12). As shown in the exhibit, Jack Canavan, Personnel Director of the Research Division, was critically involved in that activity.

When the Director of Research and IBM Executive Vice-president Ralph Gomory decided to force an "Open Door" investigation of concerns expressed by the plaintiff at his invitation (although she told him that she did not want such an investigation and was not physically up to it)[33], he appointed Mr. Canavan as the investigator despite the

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[33] See Motion Exhibit E, ¶34: "Dr. Gomory inquired about Dr. Falkoff, and suggested plaintiff might use the "open door" grievance procedure to resolve her concerns over her treatment from May 29, 1985 to the time of her surgery. But Dr.

fact that IBM's Open Door Policy states in part as follows (Motion Ex Y) (Underline added.):

> If the recipient of an Open Door appeal does not investigate the issue personally, it should be assigned to an individual who is in a recognized and responsible position organizationally removed from the employee's immediate management, and who is free of prior involvement in the circumstances of the particular case or individual appeal.

A reasonable juror might easily conclude that Mr. Canavan's prior commitment to support plaintiff's management in their preparations and plans for her ouster disqualified him as the open door investigator in this situation, that his appointment violated IBM's own policy aimed at assuring fair play, and that consequently his conclusions, set forth in Motion Exhibit P and extensively relied on by the District Court (Order p7,8 FN 13), could not be trusted[34].

Falkoff, still very weak from her surgery, wrote to Dr. Gomory that she was not physically strong enough to do so, and that it would not be her choice."

[34] Apart from the dubious nature of the report comprising Motion Ex P, the District Court, in its references to it, has drawn inferences harmful to the plaintiff not justified by the record. Thus, there are the following discrepancies between the court's findings (Order p7) and the record:

> Order: "Plaintiff's managers determined that plaintiff should be handled 'from a medical standpoint.' This approach was developed as a result of two personnel investigations, . . ."
>
> Record: The first investigation contemporaneously decided the opposite, to proceed administratively, but three months later, when the plan was made to separate the plaintiff by subverting the MDIP, a cover note was written stating the opposite (see below re Motion Exhibit O.) The statement is directly controverted by the employee's manager, who wrote on August 21, 1985: "Based upon the assessment of I.B.M. medical staff regarding Linda's physical and mental condition, my recommendation is to treat her as any other employee. Both Dr. Keller, and Dr. Robbins have examined her. . . . Both doctors stated that they found nothing to indicate that Linda had any mental problems, and that we should treat her as any other employee." (Motion Ex X 303474)

> Order: ". . . the second of which was an internal administrative employee appeals process initiated at plaintiff's request to address various of her concerns."

Record: The plaintiff specifically asked not to be involved in such as appeals process, see Note above

Order: "After an extensive investigation, an investigative report prepared for the employer concluded that the computer trainer's account with respect to the first 1985 incident was accurate."

Record: According to the report, the investigation of this incident was not at all "extensive," but absolutely minimal. The report states (p 11) (Underline added.): "The investigation found that the letter written by Neal Keller was factually accurate. This is based on comments by Neal and Betty McCarthy (eye witness)." Significantly, Ms. McCarthy had "no use of left eye," as recorded in investigator Canavan's notes (Sur-reply Ex MF7, IBM document #100283); and she was obviously coached about the incident by the selfsame defamatory letter which was sent to her, as well as to others (Sur-reply Ex WW23). Further revelatory of Mr. Canavan's predetermination of his conclusions is the fact that there is no record of an attempt to find other witnesses to an event that took place at an open office, on a busy corridor, in the middle of the work day. It is no wonder that the Appellate Division remanded the Keller case with the instruction to test the credibility of all concerned (Sur-reply Ex MF-7).

Order: "The report also concluded that with respect to the second incident plaintiff's prior manager had treated her appropriately . . ."

Record: The report actually came to no conclusion about the "second incident," which took place on June 17, 1985, stating (id) "The stories as told by both Dr. Falkoff and Ms. Gruhn relative to the 5/17 [sic] incident, were completely different." The report said nothing about appropriate treatment by the manager.

Order: ". . . and that plaintiff had been told of the exact accusations which had been made against her by several employees."

Record: The sole employee to make an accusation against the plaintiff was Neal Keller. (This is a particularly unfortunate misreading of the record.)

Order: "The investigative report did, however, criticize both her prior manager and a medical department physician for inconsistent treatment of plaintiff."

Record: The report did not so criticize the manager, but it did reveal its bias by criticizing Dr. Judith Keller, the IBM managing physician, for stating her opinion about the May 29, 1985 incident: "When I was first informed of the incident and from my knowledge of [Dr. Falkoff], I didn't think it was part of [her] character to do something like this" (Motion Ex P, p10).

Re Defendant's Motion Exhibit O, "Pollard Memorandum to File." This belated memorandum on the subject of the May 29, 1985 incident is self contradictory on the important question of whether the employee should be "handled 'from a medical standpoint.'" (Order p7). Thus, the memorandum proper, dated September 26, 1985, states:

> "As a result of my review with the parties involved, I've concluded that the incident of May 29th should be handled from a medical standpoint and not in an administrative manner."

But the final entry in the attached chronology, dated June 21, 1985, contradicts this (Underline added.):

. Meeting with Judy Keller and Alex
. Confirmed Linda not dangerous, but does need lots of support
. Okay to change managers

- Give specific responsibility
- Hold accountable for performance

. Alex will be manager

-No need to change office
-Tell "best fit"
-PC training - use other support; not Neal

A reasonable juror may well look upon a document that is self-contradictory on a key issue as being less than reliable on other issues as well, and reasonably conclude that the switch from the administrative approach, where the plaintiff would have the opportunity to be measured on her actual performance, to a "medical standpoint," where all decisions are made in secret and the employee is denied such opportunity based upon a stereotypical reaction to a perceived handicap, was and continues to be a major violation of the Rehabilitation Act.

Re Defendant's Motion Exhibit I, "Gruhn Handwritten Notes for 1982-1983." This exhibit comprises notes secretly kept by one of plaintiff's managers during a period of time well before that involved in the case at bar, from November 1981 to March 1984. They are in the nature of covert diary entries, and clearly represent only one

personal point of view regarding whatever is written about. For example, the writer criticizes her own explosiveness and personality traits, and does not include anything regarding the positive communications between her and the plaintiff. To the extent that these notes describe problems in working with the plaintiff, they are nullified by official documents such as positive performance evaluations and promotion recommendations by the same manager during the same period.

Re Defendant's Motion Exhibit G, "May 20, 1987 Chandra Memorandum to Weis." Exhibit G, and Exhibit H, of which it is part (production numbers for H are 303592 to 303598, and G continues with 303599 to 303601; 303594 refers to G) were openly and admittedly prepared for the purpose of influencing the MDIP panel. This is indicated by the last sentence of Exhibit G (303601), and is confirmed by the timing: the formal application to mandate permanent disability for the plaintiff was made on April 10, 1987 (see Medical Chart, 200526[35]), Exhibit G is dated May 20, 1987, and the panel met and ruled on the application on June 11, 1987 (Medical Chart, 200525). It is replete with factual errors, hearsay, and the writer's speculations about the working of the employee's mind.

Two of the factual errors, controverted by other evidence before the district court include:

> That "business plans[36]" "to announce TeX to our user community in December 1986" were delayed by the plaintiff's absences until May 1987; controverted by the manager's own

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35 The IBM Medical Chart for Dr. Misek-Falkoff was included as an appendix to the Kaminer Affidavit submitted by IBM in their original Motion. The pages are marked with production numbers from 200291 to 200614, but are otherwise not indexed.

36 The district court erroneously interpreted this as referring to external marketing plans for an IBM product, stating: "A memorandum from plaintiff's manager-- not controverted by plaintiff--states that plaintiff's absences contributed to a five-month delay in introducing to the market a product on which plaintiff was working." (Order, p 11) In actuality, and (of record, see submitted Performance Plan/Appraisal) no IBM product plans were involved; TeX was a competitive product being imported for internal use by a specialized internal user community. These facts are before the court in plaintiffs' Sur-reply, Exhibit MF-11, which, like the Performance Evaluation noted above, also controverts the contention that availability was delayed.

> entry on the Performance Evaluation he administered on December 1, 1986 (Answer, Ex 21) which shows that as much of the system as could work on the existing hardware was already serving the users, to wit, "Linda completed TeX release 1 installation at Yorktown & TeX output can be produced on Tektronics 618, IBM4250, and APA6670 printers."
>
> That plaintiff had stored materials in "another room," they were being moved in July 1985, and some materials were "inadvertently" dumped in the trash; again controverted by the writer himself in Motion Exhibit AA, and in the Answer, Misek-Falkoff Affidavit, ¶15. The date given in Exhibit G is wrong, it should have been January 1986; and as a result the one event becomes two in other papers, such as the moving affidavit of Weis.

The tone of the document is obviously biased. For example, it lists as an "incident" a report that the plaintiff "was going to declare herself physically handicapped." And uses innuendo: "For reasons still not clear to me . . ."

These are factors which could reasonably lead a jury to disbelieve the allegations made in Exhibits G and H, assuming that they are admissible at all, given their dependence on multiple levels of hearsay and the ulterior motive for their production. There can be no question for a reasonable juror that the plaintiff's management was under compulsion to exaggerate handicaps in order to discredit her one way or another, once they took Keller's side in the defamation action and provided him with their own attorneys[37]. IBM's interest in that suit was explicitly stated to the Keller court by attorney Garley (Sur-reply Ex AF31):

> IBM believes this lawsuit is also an indictment of IBM's management's handling and investigation of the matter. Thus, IBM's decision to provide Mr. Keller a defense in this action was motivated by its interest in supporting its management . . .

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[37] Clearly, purposely exacerbating known or perceived handicaps in concert with other goals does not vitiate the handicap discrimination.

The preponderance of the evidence is that Dr. Misek-Falkoff got along very well with coworkers and well enough with her managers.

___Exhibit 11 of plaintiffs' Sur-reply contains numerous documents attesting to Dr. Misek-Falkoff's ability to work with people. These range in date from 1979 to 1992, and include, for example, letters of appreciation from the IBM Research Center Manager of Security, the Director of IBM's Systems Research Institute, Research Staff Members, IBM marketing people, authors, a judge of Family Court, the Westchester County Medical Center (for Volunteer work), and others. And plaintiff could have presented many congratulatory letters from co-employees had she not been locked off the computers on which electronic mail routinely travelled in the community

The allegation that she was unable to get along with coworkers in the workplace is in point of fact specifically controverted by manager Ann Gruhn, who wrote as follows in an official memorandum recommending a promotion on January 10, 1984 (Answer Ex 5):

> In her current assignment YOFFICE she has demonstrated the ability to organize a large body of knowledge into a cohesive system, and to present that system in a way that is appealing to a diverse user community. She has worked well with others and required little management involvement in the project. [Underline added]

The allegation that she was unable to get along with coworkers is further controverted, as is the allegation that the plaintiff could not get along with her managers, in a memorandum written by Gruhn in February 1985, in which she expressed pride in the secretarial training program designed and partially administered by Dr. Misek-Falkoff (Sur-reply Ex 11):

> The Office Text Systems group in the Computing Systems Department has established a program to train secretaries in the use of the computing systems for office work.
>
> . . .
>
> Dr. Linda Misek-Falkoff is responsible for designing the programs and conducting the initial survey-meetings. She will be contacting you to arrange a convenient time to meet.
> I am excited by this program.

Clearly, Manager Gruhn had no hesitation in having Dr. Misek-Falkoff represent her group to other employees of the IBM Research Center.

It is the common sense of the community that there can often be personal differences or tension between managers and employees, and what counts is the answer to the question "Do they work well together in getting the job done?" That the plaintiff got along well enough with her managers is attested to by the good performance appraisals that she consistently earned, from her earliest days in IBM up until she was placed on permanent inactive status in July 1987. These good Performance Appraisals are official business documents and cannot be brushed aside and discounted in retrospect simply because the employer now conclusorily says he wants to. Even granting that there can be variations in numerical ratings, every performance appraisal has substantive goals which either were or were not accomplished to a greater or lesser degree; the appraisal documents this, management actions such as pay increases and promotions were contemporaneously effected on the basis of it, and history should not be rewritten to conform to present prohibited stereotyping.

The cited uncontroverted facts do not demonstrate that the plaintiff was not "otherwise qualified" as a matter of law

The Order cites several alleged "admissions" by the plaintiff as possibly conclusive that she was not "otherwise qualified" for her job (Order p 28). However, each one presents a genuine issue of material fact as to whether plaintiff's statements can be properly interpreted in such a way as to render the plaintiff disqualified.

Thus, plaintiff might even concede that when she was verbally taunted by Mr. Keller in front of a valued friend and coworker she had partially trained, she was frustrated and humiliated and brought her hand down on a table[38] upon which there happened to be a book (the table was not, as the lower court opinion states, near Keller). The court concedes in the opinion that this was a reaction (p6 Fn 11), and therefore not an "aggressive act" as it later (p 28) characterizes it. A reasonable juror could decide that such a reaction under the

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38 This was later documented by the female coworker who was present as a gesture to "emphasize a point."

circumstances did not render plaintiff disqualified for her job; and in any event nothing like it recurred, even though the plaintiff worked at IBM, in a covertly hostile environment, for over two years after the incident.

Plaintiff also might even concede that her trust in management was shaken when she learned that IBM was providing their lawyers for Keller and supporting a counterclaim against her, when she had actually been following the advice of the Personnel Director in bringing the defamation lawsuit. A reasonable juror could decide that such reservations about management were provoked or justified under the circumstances, including the evidence that management was planning to sever her from the workplace for nearly two years before they actually did it in a way that was discriminatory and harmful.

Plaintiff also might even concede that she was sometimes absent from the workplace for extended periods of time, due to medical problems, especially the brain-stem surgery in 1985; but all her absences were legitimate, as conceded by the defendant, and well within the limits of IBM's Sickness and Accident plan. A reasonable juror might decide that such absence was not disqulaifying for plaintiff's job, in the light of her good performance appraisals and her attested work habits of voluntarily making up for lost time. Such a juror might reasonably decide that using such absence as a disqualifier was discriminatory under the Rehabilitation Act because it disparately affects handicapped persons, who are more likely to use this supposedly universal benefit.

It is not clear from the Order where the other "admissions" are to be found in the record, and so they cannot be addressed here. If the defendant can point them out in their response the plaintiffs may be able to address them in their reply.

<u>The uncontroverted facts do show that the employer acted with discriminatory animus to the severe detriment of the employee</u>

___In finding no "discriminatory intent" in these notes of the MDIP Panel meeting of February 1986 (Order, p29; Answer, EX 13):

> "Had no problem with case. 'Someone not unsat [unsatisfactory] today--can you force her out of business.' Yes. MDIP."

the district court overlooked the that which can be found therein, to wit, that she was a satisfactory performer as of that date, and someone wanted to remove her from the workplace anyhow, using her medical handicap as an excuse, and therefore focusing on it.

The court below erred in favoring the movant in its analysis and interpretation of the actions of the employer regarding a first attempt to place the plaintiff on permanent medical disability. The court's inference that the "company's decisionmakers" deserve credit for rejecting the suggestion that an ERISA-controlled benefit should be subverted is surely leaning over backwards to give credit where none is due. But even more, the "company's decisionmakers" deserve censure for suggesting the illegal action. They brought the matter before the MDIP Panel, which was improper discriminatory per se, because as admitted by the defendant (Kaminer, Motion Affidavit 9/25/92, ¶4):

> The MDIP process is initiated by or through the employee's management when the employee's absences, behavior or performance demonstrate that the employee is unable to sustain consistent job performance as a result of his or her medical conditions. (underline added)

Whereas, at that time, the employee's most recent performance evaluation was a "2", meaning that she more than met the performance requirements of her job (Answer Ex 20):

> Results achieved CONSISTENTLY EXCEEDED the requirements of the job IN ALL KEY AREAS. (Emphasis in the original)

Thus, the mere fact that the question -- "Someone not unsat [unsatisfactory] today--can you force her out of business." -- could be asked at the Panel meeting, showing that the employee's absences, behavior, and performance were such that she actually sustained consistent satisfactory job performance, implies a deliberate violation of the predicate for bringing the matter before the MDIP Panel in the first place, and therefore is strongly indicative of a discriminatory animus[39] on the part of the plaintiff's management, the "company's

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[39] See Doe v. Region 13 Mental Health-Mental Retard. Com'n, 704 F.2d 1402, (5th Cir.1983) at 1412: "where there has been no showing of discriminatory animus . . . no violation of section 504 could reasonably be found." In the case at bar the opposite is true: there is more than enough evidence of discriminatory animus and disparate impact in the actions of the employer, as here shown in one instance, to indicate violation of §504.

decisionmakers." It may be arguable that the notation itself is not persuasuive of discriminatory intent, but there is no doubt that the fact that it could be asked in that context is the result of an intentional discriminatory action.

The defendant admits that the second application for permanent disability was discriminatory: In a memorandum from the Personnel Manager to the former Division Director of Personnel with copy to the then current Director of Personnel, she states that the employee's "ailments are not ones that normally would be covered by the [MDIP] program." (Answer Ex 19)

The pages of the second secret application for MDIP, dated April 8, 1987, are marked: "PREPARED FOR IBM ATTORNEY". (Sur-reply Ex 28; Motion Ex M.) Why would this be? At deposition, the personnel manager under whose supervision the application was prepared admitted that this was not a standard marking ("not done without thought") and was done so that ". . . IBM would be able to control whether or not the document was produced to Dr. Misek-Falkoff in a pretrial discovery stage of the lawsuit in which the document was relevant." (Sur-reply Ex WW17, Deposition p148). This surely reveals a discriminatory animus, which, even if, arguendo, not directed primarily at the employee's handicap, was nevertheless not possible to exercise absent a handicap or the perception of a handicap.

The signature page of this MDIP application has separate places for the IBM Location Physician and the Area/Divisional Medical Director. In another discriminatory divergence from standard procedure, Dr. Kaminer, the Area Medical Director, signed in both places, excluding the location physician, Dr. Judith Keller (no relation to Neal Keller), who knew the plaintiff's medical history best of all the IBM medical staff, and officially supported plaintiff's innocence in re aforementioned incident, from experience and felt knowledge of Dr. Misek-Falkoff's character (see Medical Chart).

(3) Plaintiff has been and is being adversely discriminated against through placement on permanent disability, solely on the basis of her handicap

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In Teahan v. Metro-North Commuter R. Co., 951 F.2d 511, 513 (2d Cir 1991), 113 S Ct 54, 121 L.Ed.2d 24 (1992), this court stated (at 516):

> The "solely by reason of" inquiry is designed to weed out § 504 claims where an employer can point to conduct or circumstances that are causally unrelated to the plaintiff's handicap.[40]

And further on the same page:

> A plaintiff is entitled to challenge as pretextual an assertion that the employer is not relying on the employee's handicap. But when the employer does not disclaim reliance on the handicap, the "solely by reason of" element is by definition satisfied.[41]

Plaintiff's handicap was her medical condition, as recognized by the District Court (Order pp23,24):

> Plaintiff's position is that her handicap was limited to her neurological disorder and that she was discriminated against on that basis. For purposes of ruling on this motion, I assume that plaintiff was handicapped.

Having made this assumption, it was incumbent on the District Court to find, by resolving ambiguities in the proffered evidence in favor of the non-movant, that the plaintiff was placed on permanent disability[42] solely by reason of her handicap.

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[40] In IBM's moving memorandum (p 7) they quote this passage to support their position -- with the word "related" substituted for "unrelated."

[41] See also, Pushkin v University of Colorado, 658 F.2d 1372 (10th Cir. 1991)

[42] It is ludicrous that IBM claims (Motion, Weis Aff ¶15(p); Kaminer Aff ¶17; 3(g) Statement ¶14) such placement as an accommodation ("the ultimate accommodation" (Motion, Garley Aff ¶11)) under the Rehabilitation Act, which has as a primary purpose the integration of handicapped persons into society. The fallacy of thinking that a small amount of money could compensate for the loss of a professional career and society of others was set before the lower court (Sur-reply, Falkoff Aff ¶2). The deliberate deceptions that accompanied the placement -- not advising the plaintiff of its permanence, and not giving her the option of refusing it -- are dealt with elsewhere in this brief. Both the fact of the deceptions and their nature evince a discriminatory animus, and should have been so recognized by the lower court.

Thus, while the employer harps on the plaintiff's alleged "excessive" absences, "unbusinesslike" conduct, and "inability" to perform her job, as the reasons for placing her on MDIP, these ultimately unsupportable derogations are always accompanied by the employer's averment that they were due to her medical condition. The letter of July 6, 1987 from IBM to the plaintiff, confirming her placement on MDIP, for example, recites the canards but ascribes them to the medical condition that is the basis for this action (Motion Ex DD):

> The plan [MDIP] provides for payments to employees who, due to medical reasons, are unable to perform the requirements of the job. We have placed you on this plan in light of your medical history after careful consideration of your high absence record, your periodic disruptive, unbusiness-like conduct at work and your inability to perform the requirements of your position consistently. (Underline supplied)

The employer states that the plaintiff could have been fired for cause in 1985 (Motion, Weis Aff ¶11, 12):

> 11. By late 1985, Dr. Chandra and I had concluded that IBM could no longer tolerate Misek-Falkoff's absences, disruptive behavior and lack of productivity. We were prepared to terminate her for those reasons. Because she had significant medical problems, however, we decided, in consultation with the IBM Medical and Personnel Departments, to seek disability benefits for her under MDIP rather than simply terminate her.
>
> 12. The decision to place her on MDIP was made in June 1987 by IBM's Medical Disability Panel[43] . . .

The inescapable fact is that they did not fire her (they did not have grounds to fire her, albeit they could have done it "for no cause"), but they did put her on permanent disability. They could not have done this if she were not handicapped or perceived as handicapped. Thus, on the one hand they claim they could have acted without relying on

---

[43] Why did more than 18 months elapse between the decision that Dr. Misek-Falkoff's overall performance could not be "tolerated" and her actual severance from the workplace? Why was it so important for IBM to place the employee on MDIP instead of firing her that they kept her on for a year and a half, and gave her a salary increase (denoting more than satisfactory performance) in October 1986?

the handicap, and on the other they admit to such reliance in order to do what they actually did. The lower court erred in favoring the movant in this possibly ambiguous situation and thereby failing to decide that the plaintiff was placed on MDIP solely on the basis of her handicap.

CONCLUSION

Wherefore, in view of the foregoing, the order and judgment appealed from should be reversed and the case should be remanded to the lower court for trial, and plaintiffs should be granted all such reliefs as the court may deem just in the circumstances.

Respectfully submitted

Adin Falkoff
Plaintiff-appellant, Pro se
163 Great Oak Lane
Pleasantville, NY 10570
(914) 769-3652

Supreme Court, U.S.
FILED
NOV 17 1995
OFFICE OF THE CLERK

(3)

No. 95-658

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ADIN FALKOFF -
PETITIONER

vs-

INTERNATIONAL BUSINESS MACHINES
CORPORATION -
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

Adin Falkoff, Pro se
163 Great Oak Lane
Pleasantville, NY 10570
(914)769-3652

November 15, 1995

BEST AVAILABLE COPY

22 pp

INTRODUCTION

The attention of the Court is respectfully drawn to an article in the November 6, 1995, issue of *The National Law Journal* under the rubric, "Employment Law,"[1] in which the instant case, Misek-Falkoff v. IBM, is one of three cases the authors use in a discussion of how current laws apply to telecommuting.[2] The article raises the question of whether an employer can be compelled to allow disabled employees to telecommute, and concludes that the courts in various Circuits differ on the issue. However, in the course of the discussion the article makes assertions about the plaintiff, Dr. Misek-Falkoff, which, though based on the authors' reading of the Memorandum Order of the District Court, are not in accord with the actual facts. The discrepancy can be traced back to deliberate obfuscation, by defendant IBM's attorneys and witnesses, of the true nature of the plaintiff's job at the time of her involuntary placement on total disability status in 1987. Publication of this article highlights the fact that the defendant comes to the Court with unclean hands and should therefore not be entitled to the affirmative defense of *res judicata*.

THE DECEPTIVE STRATEGEM

Regarding this case, the article in the *National Law Journal* states as follows:

> ". . . in *Misek-Falkoff v. IBM*, Judge Vincent L. Broderick, of the Southern District of New York, found it acceptable for the employer to reject the telecommuting option because the plaintiff's duties as a developer and manufacturer of computer systems required her actual presence in the workplace. The plaintiff conceded at her deposition that an essential part of her job was to collaborate with other employees and attend meetings and training sessions." [Underline added.] (This excerpt and associated portions of the article are shown in Exhibit 1.)

---

[1] Allan H. Weitzman & Kathleen M. McKenna, *Employment Law: With millions of Americans telecommuting, businesses must determine how current laws apply to this new form of work*, Nat'l L. J., Nov. 6, 1995 at B4, B6.

[2] That is, working from home or another alternative work site enabled by new information technologies such as personal computers, groupwork-facilitating software, facsimile machines, and teleconferencing equipment.

In point of fact, plaintiff made no such concession at her deposition or elsewhere. The underlined phrase derives from a statement in the District Court Order[3] which refers to "plaintiff's own definition of her duties at deposition," which, in turn, derives from material on the subject put before the court by the defendant. This deliberately misleading material was mainly an exhibit ("Exhibit J" of IBM's Reply of June 3, 1993, reproduced here in its entirety as Exhibit 3) comprising only that part of a deposition which described the work activities of the plaintiff's job assignments prior to 1985, leaving out preceding deposition pages (shown here as Exhibit 2) which would have made clear that these were not activities of her job for the two years leading up to when she was put out on disability in July, 1987. Affidavits in the aforementioned Reply, by the attorney who conducted the deposition, and others, then cited the job descriptions in "Exhibit J" to give false authority to statements about plaintiff's job which simply did not apply during the time period critical to the litigation and judgment.

Appendix H of this petition, a reproduction of the Brief of Plaintiff-Appellant placed before the Second Circuit Court of Appeals, describes, on pages 33-35 (shown again here as Exhibit 4), the clear difference between Dr. Misek-Falkoff's job activities before and after mid-1985 (footnotes 28 and 29), and how the misleading "Exhibit J" was used to confuse the situation and thereby deceive the court on a crucial point.

DISCUSSION

It is a well established principle that an affirmative defense is not available to a party with unclean hands. The cited article shows that the subject matter of the deception practiced on the District Court was material and important in this case. Hence, regardless of the result of this attempt to improperly influence the outcome, use of such a deceptive strategem should have perforce vitiated the affirmative defense of *res judicata*.

Inasmuch as the Brief of Plaintiff-Appellant submitted to the Court of Appeals did describe the deception, it must be asked why that court gave no recognition to a matter of fundamental importance. One answer may be that papers by *pro se* litigants are simply not

---

[3] *Misek-Falkoff & Falkoff v. International Business Machines Corp.*, 854 F.Supp. 215, 226-227; Petition Appendix C, p. 18

given the same weight as those by members of the Bar, or the Court of Appeals' neglect of this issue may be considered another aspect of departure from the usual course of judicial proceedings that requires the exercise of this Court's power of supervision.

CONCLUSION

The publication and republication of wrong and false information is hurtful to the parties involved and harmful to the fabric of society. I have seen how the principal plaintiff in this action has been adversely affected by the untruths propagated about her in the litigation papers and consequent published decisions, and I ask that this Court exercise its powers of review to mandate a more responsible search for the truth, so as to reinforce the potential of the judicial process to have a healing, rather than a destructive, effect.

Dated, November 16, 1995

Respectfully submitted,

Adin Falkoff

Adin Falkoff, pro se petitioner

Employment Law *Allan H. Weitzman • Kathleen M. McKenna*

With millions of Americans telecommuting, businesses must determine how current laws apply to this new form of work.

. . .

The ADA does not address telecommuting directly. Because the law requires employers to make reasonable accommodations for disabled workers, however, home offices and telecommunication centers must be considered as options. There are few reported decisions on this topic, and the courts appear to be divided on the circumstances in which an employer can be compelled to allow disabled employees to work at home.

The U.S. Court of Appeals for the District of Columbia Circuit and one federal district court judge have determined that employers are required to consider telecommuting for employees as a potential form of accommodation but are permitted to reject this option in the appropriate circumstances. In *Carr v. Reno*, the D.C. Circuit found it reasonable for the U.S. attorney's office to reject the option of telecommuting for the plaintiff — a coding clerk — when the plaintiff herself admitted that her job tasks could not properly be performed at home.

Similarly, in *Misek-Falkoff v. IBM*, Judge Vincent L. Broderick, of the Southern District of New York, found it acceptable for the employer to reject the telecommuting option because the plaintiff's duties as a developer and manufacturer of computer systems required her actual presence in the workplace. The plaintiff conceded at her deposition that an essential part of her job was to collaborate with other employees and attend meetings and training sessions.

The judge reasoned that in these circumstances, the employer was not required to allow the disabled employee to telecommute. As he explained, "[a]n employer may certainly require an employee's presence at the workplace when interaction with others is essential to the task to be performed."

Exhibit 1. *Excerpt from article in* The National Law Journal

Courts differ on the issue of whether an employer can be compelled to allow disabled employees to telecommute.

These decisions do not discuss whether plaintiffs' jobs required their presence on a daily basis. Thus, it was left unresolved whether the employers would be required to allow the employees to telecommute two or three days per week as a reasonable accommodation under the ADA.

The 7th Circuit has taken the position that an employer generally is not required to accommodate a disability by allowing the employee to work at home. In *Vande Zande v. State Department of Administration*, the plaintiff worked for the housing division of the Wisconsin Department of Administration as a program assistant. Her tasks were of a clerical and secretarial nature. In 1992, she suffered from ulcers and needed to take an eight-week sick leave. Lori Vande Sande asked her supervisor if he would provide her with a desktop computer so that she could work full-time at home during her medical leave. Her supervisor refused.

Ms. Vande Zande filed suit, alleging that the employer's refusal constituted a failure to reasonably accommodate her disability. She argued that under the ADA, her employer was required to install a computer in her home and allow her to work full-time there. The court disagreed, finding that the concept of "reasonable accommodation" does not require an employer "to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced.

Additionally, the court stated that in most jobs, employees are required to work in supervised groups. "[T]eam work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance." Thus, the 7th Circuit seemingly has taken the position that telecommuting is a "reasonable accommodation" only in extraordinary circumstances.

Exhibit 1. *Excerpt from article in* The National Law Journal

The 5th Circuit, however, apparently does not agree that telecommuting is required only in exceptional cases. In *Anzalone v. Allstate Insurance Co.*, Judge Sarah S. Vance stated that "[q]uestions of reasonable accommodation are specific to the nature of the job, the individual, and the disability" and the determination must be made on a case by case basis. After evaluating the particular facts of Antonino Anzalone's claim, the court concluded that the distinct nature of his employment made telecommuting a "reasonable accommodation."

Specifically, the court found that Mr. Anzalone was a claims adjuster who spent a substantial part of his time working in the field. Most of his job functions ordinarily were conducted outside of the office. Therefore, the need for his presence in the office was greatly diminished, and it was not evident that Mr. Anzalone's productivity would decrease if he worked at home.

Additionally there was evidence that Allstate permitted other claims adjusters to work out of their homes. This practice undermined the employer's argument that telecommuting created an "undue hardship."

Thus, the ADA may, depending on the circumstances, force employers to comply by offering telecommuting as another avenue for accommodating disabled workers. Therefore, it is important for an employer to evaluate carefully the job held by a disabled employee to determine whether telecommuting is a reasonable option. Thus far, the cases teach that if the employee is able to perform his or her essential functions effectively at home, there may be an obligation to allow the individual to telecommute unless such an arrangement would create an undue hardship.

. . .

Mr. Weitzman and Ms. McKenna, Business Watch columnists, are partners at the Boca Raton, Fla., and Clifton, N.J., offices of New York's Proskauer Rose Goetz & Mendelsohn L.L.P., where they practice labor and employment law. Ilene Freier, an associate in the firm's New York office, assisted in the preparation of this article.

Exhibit 1. *Excerpt from article in* The National Law Journal

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LINDA D. MISEK-FALKOFF and ADIN FALKOFF,

Plaintiffs,

-against-

89 Civ. 6269

INTERNATIONAL BUSINESS MACHINES, CORP.,

Defendant

----------x

February 19, 1991
10:35 a.m.

Deposition of plaintiff LINDA D. MISEK-FALKOFF taken by Defendant, pursuant to notice, held at the offices of Seward & Kissel, Esqs., One Battery Park Plaza, New York, New York, before Joseph R. Danyo, a Shorthand Reporter and Notary Public within and for the State of New York.

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WALTER SHAPIRO, CSR
CHARLES SHAPIRO, CSR

369 LEXINGTON AVENUE
NEW YORK, N.Y. 10017
(212)867-8220

Exhibit 2. *Omitted deposition pages indicating time period*

EMPLOYMENT LAW *Allan H. Weitzman • Kathleen M. McKenna*

With millions of Americans telecommuting, businesses must determine how current laws apply to this new form of work.

THE PHENOMENON of telecommuting is bringing about fundamental changes in the workplace and, in the process, sparking an evolution of employment law. The familiar employment arrangement, under which employees commute to centralized offices, no longer is a universal standard.

Traditionally, employees were required to travel to the workplace "because that is where the tools, information, work-in-progress, files and other employees were located."[1] New information technologies—personal computers, facsimile machines and teleconferencing equipment—enable many employees to work as effectively from home or from an alternative work site. As a result, an increasing number of employers have recognized telecommuting as a viable alternative to the traditional work arrangement.

In fact, the last full week of October was officially observed as "National Telecommuting Week." According to experts in the area of "telework," almost 9 million American employees telecommuted in one form or another in 1994.[2] Link Resources Corp., an information industry research firm, predicts that this number will reach more than 13 million by 1998.[3]

Employers find the telecommuting option intriguing because it allows for office space savings and a reduction in overhead expenses, provides family-friendly work schedules for employees and increases employee job satisfaction and productivity. It also provides additional opportunities to individuals with disabilities who seek accommodation under the ADA, or Americans With Disabilities Act,[4] and for employees who may qualify for an unpaid leave under the Family and Medical Leave Act[5]—such as those caring for family members with serious health conditions—but who would prefer to work at home. By allowing these employees to work from home, employers may be able to retain skilled, trained employees and cut personnel costs.

Before implementing a telecommuting policy, it is important to evaluate the legal implications for managing employees who work from their homes. Telecommuting may affect an employer's compliance with the ADA and the FLSA, or Fair Labor Standards Act.[6]

The ADA does not address telecommuting directly. Because the law requires employers to make reasonable accommodations for disabled workers, however, home offices and telecommuting centers must be considered as options.[7] There are few reported decisions on this topic, and the courts appear to be divided on the circumstances in which an employer can be compelled to allow disabled employees to work at home.

The U.S. Court of Appeals for the District of Columbia Circuit and one federal district court judge have determined that employers are required to consider telecommuting for disabled employees as a potential form of accommodation but are permitted to reject this option in the appropriate circumstances.[8] In *Carr v. Reno*, the D.C. Circuit found it reasonable for the U.S. attorney's office to reject the option of telecommuting for the plaintiff—a coding clerk—when the plaintiff herself admitted that her job tasks could not properly be performed at home.

Similarly, in *Misek-Falkoff v. IBM*, Judge Vincent L. Broderick, of the Southern District of New York, found it acceptable for the employer to reject the telecommuting option because the plaintiff's duties as a developer and manufacturer of computer systems required her actual presence in the workplace. The

WHY YOU SHOULD ORDER THE

Exhibit 1. *Excerpt from article in* The National Law Journal
1

A. Yes.

Q. Did there come a time when you were promoted to staff systems analyst in the text processing group?

A. Yes, after I had been in this education group for a while.

Q. Do you recall when you were promoted to that position?

A. That could have been 1984. I haven't reviewed this in years.

Q. If I mentioned March of 1984, does that refresh your recollection?

A. It makes us agree, doesn't it? I don't know. I am trying to help you with some of the dates. Thank you.

Q. Does that refresh your recollection as to when you were promoted to staff systems analyst?

A. Yes, thank you.

Q. Does that also help you remember approximately when Ann Gruhn split the group into two groups?

A. I still say it could have been a year before because I was in education for a while, but

Exhibit 2. *Omitted deposition pages indicating time period*

no longer classified as a programmer because Ann said that I was not competitive as a programmer and shouldn't be in programming.

Q. During the period that you were a programmer, that is, the period before Ann Gruhn split the group into two groups, can you describe for me generally what your duties and responsibilities were as you understood them?

A. Across the board.

Q. Yes.

A. I meant that. That was the answer. Are you familiar with software engineering?

Q. Not really.

A. To make it very simple, not because -- excuse me. I mean to try to be general.

Q. Simple is fine with me.

A. As you know probably even in your own work, you decide something needs to be done and there is work going to be done gathering requirements and deciding what needs to be done, and then you look to getting up specifications with a cost benefit point of view, what they want, what it will cost both them and you and whether

Exhibit 2. *Omitted deposition pages indicating time period*

Q. When you taught, did you teach with any other IBM employees, in other words, did someone else assist you in teaching?

MS. GOLDEN: Objection to form.

A. I really don't understand the question. Do you mean were they standing up next to me?

Q. Right.

A. I think on a couple of occasions when Betty McCarthy and I graduated secretaries from the respective program, we were in the same room and alternately did parts of handing out the certificates.

Q. You also mentioned that part of your responsibilities included designing programming for others while you were in the education group.

A. Designing systems.

Q. Systems, I'm sorry.

A. I'm sorry?

Q. I said I was sorry.

A. I guess we are all sorry.

Q. The work that you did designing systems, can you describe that for me?

A. Which system would you like described

Exhibit 2. *Omitted deposition pages indicating time period*

because they used different underlying software bases?

Q. What I would like you to describe first is the procedure, functionally what you did?

A. Sir, I can't, any more than you can make me a lawyer in this room with your years of experience, make you a software engineer. Please be more specific.

Q. Did you design teaching programs --

MS. GOLDEN: Can we take a brief break so the witness can speak to her husband?

MR. GARLEY: Sure.

(Discussion off the record)

MS. GOLDEN: Before we resume the deposition, I wanted to put on the record that my client is not feeling very well. She has a headache and she has just taken some medication which may make her -- which may affect the way she answers questions, so you may want to ask her a little bit about the medicine.

MR. GARLEY: Off the record for a moment.

Exhibit 2. *Omitted deposition pages indicating time period*

questions, if you feel physically ill, I would ask that you tell us and that we will break.

A. Thank you.

Q. If necessary, we may also ask to adjourn.

A. Yes, thank you. Mr. Hankin informed me of this convention.

MR. GARLEY: Ms. Golden, I would like you to know that we are concerned about the capacity of the witness to testify. None of us know anything about these drugs so I don't know what effect they may have on someone, so we are also going to reserve our right to adjourn the deposition if it becomes apparent to us that Dr. Misek-Falkoff is having difficulty continuing.

MS. GOLDEN: O.K.

MR. GARLEY: That being said, off the record.

(Discussion off the record)

Q. I will try to be more specific. I think that the first question I want to ask was just describe how you go about designing systems,

Exhibit 2. *Omitted deposition pages indicating time period*

and if you need to say that there are different methods depending on different systems or whatever, feel free to do that.

A. Ordinarily a manager has a preference for a starting point that one investigates as an analyst. They prefer that it be a relational data base or something written in what is called a second language or combined with the more traditional languages, such as PLl, APL.

I can't think of too many other ones that I actually used. So you don't start off just guessing. You have direction from your manager, please explore, the availability, with the other consultants of the tools that you are going to use.

I must say that there are -- let me start again. "Systems" is a word that can be used in many ways, as you know. If you are talking about software systems -- computer software systems, that is the question I am answering. There were other intellectual pursuits I was engaged in with people at Watson where we were designing systems but they didn't have to do with coding. They were maybe taxonomies, coming up

Exhibit 2. *Omitted deposition pages indicating time period*

ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LINDA D. MISEK-FALKOFF and ADIN FALKOFF,:

Plaintiffs, :

-against- :89 Civ. 6269

INTERNATIONAL BUSINESS MACHINES, CORP., :

:

Defendant

:

----------x

February 19, 1991
10:35 a.m.

Deposition of plaintiff LINDA D. MISEK-FALKOFF taken by Defendant, pursuant to notice, held at the offices of Seward & Kissel, Esqs., One Battery Park Plaza, New York, New York, before Joseph R. Danyo, a Shorthand Reporter and Notary Public within and for the State of New York.

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CHARLES SHAPIRO, CSR

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Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

Appearances:

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BY: SCOTT R. GARLEY, ESQ.,
-and-
MICHAEL P. ENRIGHT, ESQ.,
of counsel

Also Present:

SALLY LU LAKE, ESQ.,
IBM Corporation

ADIN FALKOFF

oOo

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

with taxonomies, cognitive science things, psychology things that it may be in the end they eventuated in a little experiment on a computer, but I wasn't part of that. I was part of the initial planning of these systems, meaning the conceptual system. I was afraid that was getting mixed up. We haven't even begun to talk about that.

Q. I will ask you in a few minutes about some examples of the software that you helped design, but at the moment I am just asking the physical steps, the functional steps of what you did to design software.

A. A computer software system, not a conceptual system.

Q. So in those instances where you designed computer software, did you do that with other people?

A. Definitely. Not the coding but the requirements gathering, and I would say the two nether ends, requirements and design, and when you test it, you try to test them with ergonomics experts, and we did, cognitive science people. Human factors. That was the general phrase. As

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

well as eventual end users, secretaries, et cetera.

Q. How did you collect user requirements?

A. By speaking to a broad -- by defining a broad band width of potential users and judges of those users and of those systems. As I said, I think maybe I wasn't really clear, ranging from novice to expert users but also including those who critiqued such systems.

Q. Did you talk directly with those individuals?

A. Yes. I also assisted them in their own research and their own systems building, but right now you are asking about the systems for which I would be accredited, right?

Q. Correct.

A. Right.

Q. During I believe what you called the requirements and design phase, did you deal also with individuals in your own working group?

A. Sure.

Q. Were there particular individuals with whom you worked?

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

A. I talked to everyone.

Q. Everybody in the text processing group?

A. They had different specialties, and you check out different aspects of what you are doing briefly to see if there was something they wanted to comment on, sure.

Q. You worked with everyone within your, I think you called the education group?

MS. GOLDEN: I object to the form.

Q. I am trying to find out what group you were referring to.

A. In no one project do I think I consulted with every one of them, but if you say accumulated three projects, they all would have been included, sure, that is how you do it.

Q. During the --

A. That is half of how you do it. The other half is you work with people outside of your project.

Q. With respect to the first half, that is, dealing with people within your group, can you describe the ways in which you met with them? Did you have group meetings, were there regularly

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

scheduled meetings? I am giving you some examples.

A. It is helpful. Thank you.

We did have regular meetings where we shared ideas, and we would go around and talk about our current project and ask for input because we all had different specialties but we also met one on one in one another's office. We also dealt through electronic mail. We also served as subjects; in other words, someone would say, "It is not perfect but it is close, would you be willing to try it out." In a small family-like community, it is very hard to think off the top of my head of every way in which one interacts in a casual and friendly atmosphere. But definitely, I would say that interaction in your own group is about a third for building a system for 2,000 to 2500 users, and then they transport it to other locations.

Q. I don't know how to phrase this, but what would make up the other two-thirds?

A. You phrased it beautifully, and I apologize if I seem to be too interested in my feeling and not of yours.

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

I worked with computer scientists, cognitive scientists, human factors people in the building, TJ Watson. I made trips to Eastview, Stormytown, met with patents, met with the attorneys there. With Project Respect, which was one of my main, I feel, achievements, I am pleased with it and I heard they are still using it, I visited with the physical science department administrator, and in fact, one of my earlier projects I met with the head of the department, I believe his name was Armstrong, and I met with six managers on that project, Model Shop.

You see it is so spread, you begin to understand my dilemma here. Six or seven discrete departments and personally interviewed them for their needs. And at other times they had projects and they would come to me for me to critique them. So it is a fluid community, the research center. I don't think it is quite as superficially structured maybe as a branch office or a sales point would be.

Q. What you just described would make up the other two-thirds of your time, your work time?

MS. GOLDEN: Objection to form.

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

that information.

MR. GARLEY: Would you be able to respond to my letter regarding the document production prior to whatever date we agreed to?

MS. GOLDEN: Yes, I think so.

(Time noted: 4:50 p.m.)

[signed] Dr. L. D. Misek-Falkoff

subscribed and sworn to before me
this 26th day of July, 1991.
[signed] William D. Frumkin
[stamped] Notary Public, etc.

Exhibit 3. *Complete "Exhibit J" of defendant's reply brief*

employment, in light of the employer's official job description for a staff systems analyst and office educator.

But in late 1985 and continuing until the placement on forced disability status in mid-1987, plaintiff's job was severely narrowed to the point where her assigned tasks did not match the description of her former staff systems analyst job, and she was no longer an office educator[27]. Consequently the significance of absences and interpersonal relations was much less, and the District Court necessarily errs in accepting as a standard the employer's false depiction of the requirements at the time in question. Countervailing facts were before the Court, in the form of performance plan job descriptions (compare Answer Ex 21, Performance Plan of 1/28/86[28], and Answer Ex 20, Performance Plan of 1/11/84[29]), item

---

[27] The change in assignment was punitive, and not by reason of any failure in performance, which was more than satisfactory in every aspect of her job. See footnotes below.

[28] The principle assignment after 1985 reads thus:

> Install TEX on Yorktown VM systems. Ensure that the installation is complete and verify that TEX works.
> Determine what printers are supported and what fonts and in what sizes are available for which printers.
> Understand and document existing procedures to use TEX.

Compare this with the last previous assignment described in the following footnote.

[29] The principle assignment prior to mid-1985 reads thus:

> Linda's main assignment is to establish a program to ensure that our users take advantage of the tools we have provided to improve productivity in the office. Her responsibilities include the following:
> * establish education programs to reach users who don't come to the RelEP sessions and who are using obsolete methods (e.g. executive secretaries, managers)
> * develop user documentation and teaching aids
> * investigate alternative approaches to self-education (e.g. combination of slides and taped monologues, videotape, online interactive sessions, learning center)
> * provide a program for new user education designed especially for secretaries, and assist in administering the program as needed.

Exhibit 4. *Pages from Brief of Plaintiff-Appellant* (Appendix H, 33-35)

14(e) of Plaintiff's Amended 3(g) Statement, Dr. Misek-Falkoff's sworn statement (Answer, Aff. ¶25), and Mr. Falkoff's sworn statement (Sur-reply, Aff. p7 ¶10[30]).

Indeed, the lower court noted that the employee's job was changed: "Plaintiff claims that the employer . . . removed her from her position as a computer analyst and office educator" (Order, p2); ". . . she was later moved to another facility, and her job assignment was modified." (Order p7); and a quotation, "'[He] [i.e., her manager] made more cuts in her job at that point.'"

Nonetheless, defendant begs the question of the job requirements at the time of the MDIP by talking about the job requirements of the staff systems analyst and office educator assignments, without saying that they obtained pre-1986, and not at the relevant time (Answer, Weis Aff ¶16; Garley Aff ¶11 et seq). Defendant also introduces into the record some pages from Dr. Misek-Falkoff's deposition testimony about her work when she was working as a staff systems analyst and

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> Evaluation criteria include the quality of the program Linda defines, her ability to manage its implementation, and the completeness and effectiveness of documents she writes and presentations she puts together.

It is noteworthy that the execution of this assignment, the last as a staff systems analyst and office educator, and one indeed requiring sensitive interaction with others and timely results, was rated "CONSISTENTLY EXCEEDED the requirements of the job IN ALL KEY AREAS." (Emphasis in original)

[30] Sur-reply, Falkoff Aff., p7, clearly affirms that plaintiff's job was different, and points out where defendant's affidavit's deliberately confuse the chronology and are in error:

> . . . Weis (in ¶16) and Garley in ¶¶11-15, talk about Dr. Misek-Falkoff's job responsibilities in 1984-1985, as if they were the same in 1986-1987. She was still rated a Staff Systems Analyst until her MDIP termination, but there is ample testimony which need not be repeated here that her job, once she returned from brain-stem surgery and was being held in disfavor on account of the Keller defamation, was reduced to that of a programmer (not a dishonorable profession by any means, but not Dr. Misek-Falkoff's forte) with minimal requirements to personally interact with people. In fact, her management chose to isolate her from her group and steadily reduce her contacts both within the Research Division and outside it, so that she would not be missed by many people when they eventually let the axe fall.

office educator, that is, when she was designing systems and software[31]. Thus, the Court errs in accepting the defendant's description of the requirements of the employee's job in the period addressed by this action, and also when citing the "plaintiff's own definition of her duties at deposition" (Order p26) as the basis for judging whether she was "otherwise qualified" at the relevant time.

The formal written appraisals of the plaintiff's performance, conducted by the employer as a normal business practice, unequivocally show that she more than satisfied the requirements of her jobs (Answer, Ex 20 21 22 23; Order p5 Fn7). These appraisals were made by seasoned managers "trained in the evaluation process," and were monitored for quality by the Personnel Department (Answer Ex 6, Bergren deposition pp285 286). The written evaluations are intended by IBM to be definitive about all aspects of performance:

> The purpose of the Performance Planning, Counseling and Evaluation Program is to let employees know what is expected of them, how they are doing, and how they may improve their performance. It also provides a means of evaluating an individual's overall performance as a primary consideration for salary purposes. (Answer Ex 7, pages from IBM Manager's Manual[32])) (Underlines added)

An overall level of performance necessarily takes into account the effect of absence from the workplace, and the fact that attendance may be independently considered a "condition of employment" is orthogonal to this.

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[31] The deposition extract (Reply, Ex J) starts at a point that tends to obscure the fact that the plaintiff's description of her work relates to a type of assignment she no longer had after 1985. Nevertheless, if one recognizes that she was not expected to plan "conceptual systems" or "design software" in her final assignment, the true nature of the questioning is revealed (underline added):

> A. . . . I was part of the initial planning of these systems, meaning the conceptual system.
>
> Q. I will ask you in a few minutes about some examples of the software that you helped design, but at the moment I am just asking the physical steps, the functional steps of what you did to design software.

[32] Also see Answer Ex 26, page from "About Your Company," handbook for employees.